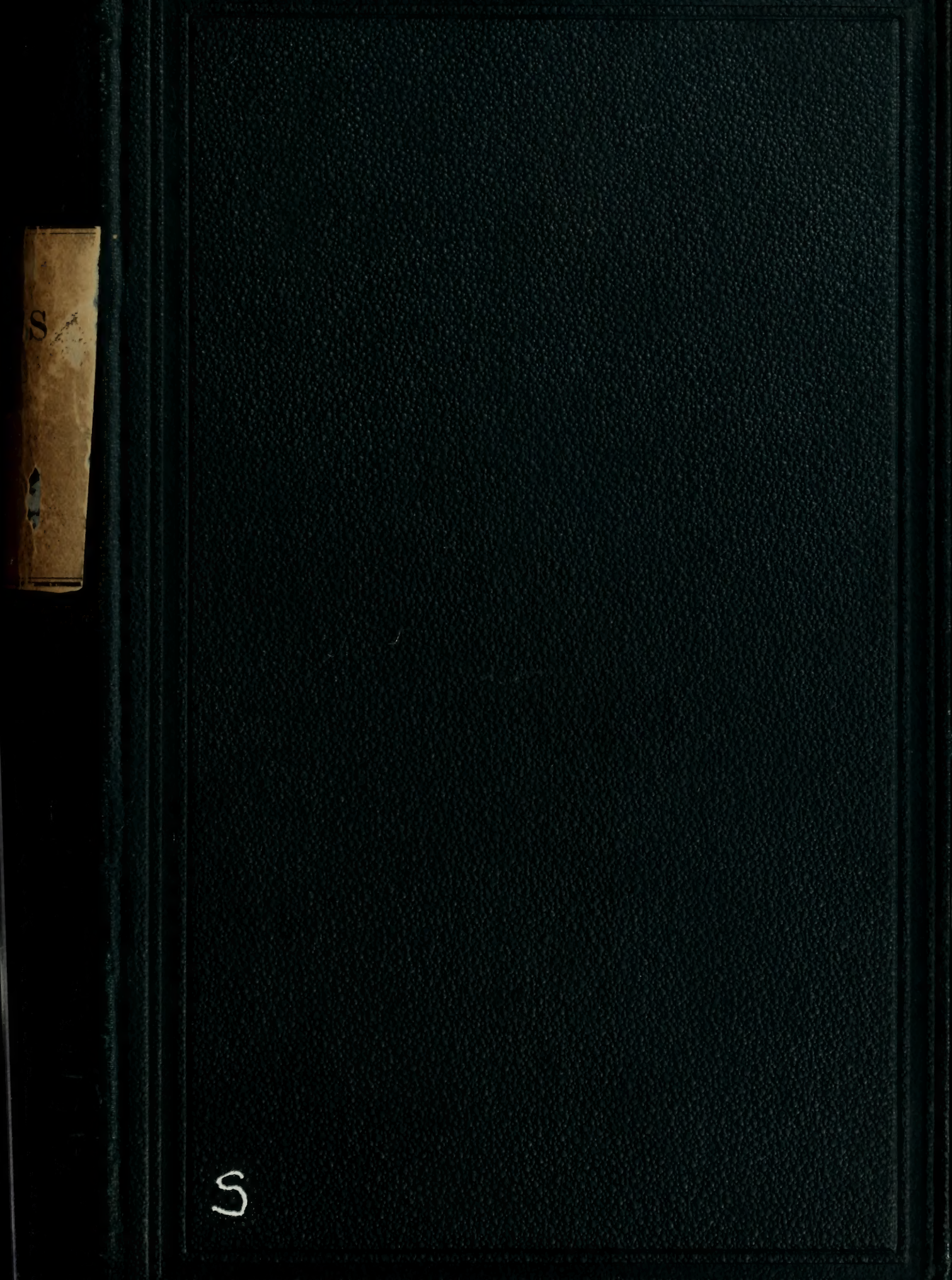
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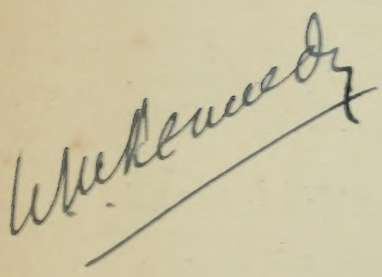

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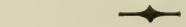

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NEW COMMENTARIES

ON

THE LAWS OF ENGLAND.

BOOK IV.

OF PUBLIC RIGHTS—(*continued*).

PART III.

OF THE SOCIAL ECONOMY OF THE REALM.

In our examination of Public Rights, we have treated successively of the *Civil Government* and of the *Church*. But there are many other institutions which belong, equally with these, to the Division of Public Rights,—as relating immediately to the community at large, or to large classes of it, and not merely to the individual; and which yet, as having no proximate connection with the subject of government, either civil or ecclesiastical, have hitherto found no proper place in our disquisitions. These may be designated without impropriety (though perhaps without sufficient authority) as the laws of *Social Economy;* and they will now be considered under their principal heads.

CHAPTER I.

OF THE LAWS RELATING TO CORPORATIONS.

SECTION I.

OF CORPORATIONS IN GENERAL.

The nature and principal characteristic of bodies corporate (*corpora corporata*), or corporations, has already been in some measure explained (*a*); and we have seen that corporations are artificial persons, recognized or constituted by the law, and endowed by it with the capacity of perpetual succession (*b*).

[Of corporations there is a great variety, subsisting for the advancement of religion, of learning, or of commerce; in order to preserve entire and for ever those rights and immunities, which, if they were granted only to the individuals of which the body corporate is composed, would upon the death of such individuals be utterly lost and extinct. To show the advantages of these incorporations, let us consider the case of a college in any of our universities, founded *ad studendum et orandum*, for the encouragement and support of religion and learning. If this were a mere voluntary assembly, the individuals which compose it might indeed pray, study, and perform scholastic exercises

(*a*) Vide sup. vol. I. pp. 126, 346, 426, 444. (*b*) Vide sup. vol. I. p. 346.

[together, so long as they could agree to do so; but they could neither frame nor receive any laws or rules of conduct—none, at least, which would have any binding force, for want of a coercive power to create a sufficient legal obligation. And so also, with regard to holding property, if land be granted for the purposes of religion or learning to twenty or fifty individuals not incorporated, there is no legal way of continuing the property to any other persons for the same purposes, but by endless conveyances from one to the other as often as the lands are changed. But when such grantees are constituted a corporation, they and their successors are then considered as one person in law; and as one person, they have one will, which is collected from the sense of the majority of the individuals: and this one will may establish rules and orders for the regulation of the whole; or rules and statutes may have been prescribed for it on its original incorporation, which latter may be called the laws of its being, and correspond more or less with the laws of nature relative to individuals (*c*). Again, the privileges and immunities, the estates and possessions of the corporation, when once vested, will remain for ever vested therein, without any new conveyance to new successors; for all the individual members that have existed from the foundation to the present time, or that shall ever after exist, are but one person in law, a person that never dies.

The original invention of corporate bodies is commonly attributed to the antient Romans; Plutarch says they were introduced by Numa; and however that may be, they were much considered and also developed by the civil law, in which they were sometimes called *universitates* and sometimes *collegia* (*d*), either phrase denoting an aggregate of individual entities; and with us, a university commonly denotes an aggregate of colleges. The principle of the corporation was also recognized by the canon law,

(*c*) 1 Bl. Com. p. 468.

(*d*) Ff. l. 3, t. 4, per tot.

[for the maintenance of ecclesiastical discipline; and from that law our spiritual corporations are derived. But our laws, according to the usual genius of the English nation, have considerably refined and improved upon the original invention (*e*).]

For with us, [the first division of corporations is into *aggregate* and *sole*. Corporations *aggregate* consist of many persons united together into one society, and are kept up by a perpetual succession of members so as to continue for ever—of which kind are the mayor and commonalty of a city, the head and fellows of a college, the dean and chapter of a cathedral church. Corporations *sole* consist of one person only and his successors, in some particular station; who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they would not have. In this sense the sovereign is a sole corporation; so is a bishop; so are some deans, as distinct from their several chapters (*f*); and so is every rector and vicar (*g*); and so also are vicars choral (*h*); and the vicars and perpetual curates of modern creation (*i*). And the great utility, and even the necessity, of our law recognizing corporations sole will be very apparent, if we consider the case of the parson of a church. At the original endowment of parish churches, we may remember, that the freehold of the church, the churchyard, the parsonage-house, the glebe, and the tithes of the parish were vested in the parson by the bounty of the donor, as a temporal recompense to him for his spiritual care of the inhabitants; and with intent that the same should ever

(*e*) The Roman law required three persons to make a corporation (*Tres faciunt collegium*); but if afterwards the members were reduced to one, the corporation would continue (*Si universitas ad unum redit, stet nomen universitatis*). See Ff. 3, 4, 7; 50, 16, 8, 9.

(*f*) 1 Bl. Com. p. 470.

(*g*) Co. Litt. 43.

(*h*) Greaves *v.* Parfitt, 7 C. B. (N. S.) 838.

(*i*) Sup. vol. II. pp. 679, 745.

[afterwards continue as a recompense for such care. But this freehold, if vested in the parson in his natural capacity, would on his death have descended to his heirs; who might or might not have been compellable to convey it to the next incumbent; and at the best, the conveyance would have been attended with expense and trouble, to be repeated again and again on every change of incumbent. The law, therefore, has wisely ordained, that the parson, *quatenus* parson, shall never die, any more than the sovereign—by making him and his successors a corporation. By which means all the rights of the parsonage are preserved entire to the successor; for the present incumbent, and his predecessor who lived eight centuries ago, are in law one and the same person: and what was given to the one, was given to the other also.

Another division of incorporations is into *ecclesiastical* and *lay*. Ecclesiastical (or spiritual) corporations are where the members are entirely spiritual persons, such as bishops, parsons, and the like, which are corporations sole; or such as deans and chapters, which are corporations aggregate; and, formerly, prior and convent, abbot and monks, were also corporations aggregate,—all which corporations are constituted for the furtherance of religion, and for perpetuating the rights of the Church. On the other hand, lay (or temporal) corporations are of two sorts, *civil* and *eleemosynary*. *Civil* corporations are such as are erected for a variety of temporal purposes; for instance, the sovereign is a corporation sole, in order to prevent an *interregnum*, or vacancy of the throne on death, and to preserve the possessions of the crown. And there are civil corporations erected for the good government of a town or particular district,—as a mayor and commonalty, bailiff and burgesses, and the like;] all which are now commonly denominated municipal corporations, of which, (and also of parish councils which are corporations of a very recent creation,) we shall have occasion to speak more at large before the conclusion of this chapter. Yet other

civil corporations are established for the advancement and regulation of manufactures and commerce,—as the trading companies (or guilds) of London and other towns,—or for the better carrying on of divers special purposes,—as the Royal College of Physicians, the Royal College of Surgeons of England, the Royal Society for the advancement of physical knowledge (*k*), the Society of Antiquaries, and a variety of others. [And among the same class of lay incorporations, the Universities of Oxford and Cambridge must be ranked (*l*) ; for it is clear that these are not *ecclesiastical*, but *lay* corporations, being composed of more laymen than clergy: and they are not *eleemosynary* foundations, though stipends therein are annexed to particular professors, for such stipends are rewards *pro opere et labore*, precisely as in the case of the salaried officials of ordinary civil corporations.

Eleemosynary corporations are such as are constituted for the perpetual distribution of the free alms or bounty of the founder of them, to such persons as he has directed.

(*k*) Beaumont *v.* Oliveira, Law Rep., 4 Ch. App. 309.

(*l*) Rex *v.* Cambridge (Vice-Chancellor), 3 Burr. 1656. It may be worth remark here, that under the 17 & 18 Vict. c. 81 ("The Oxford University Act, 1854," as to which statute, see The Queen *v.* Vice-Chancellor of Oxford, Law Rep., 7 Q. B. 471), the government of the university of Oxford is mainly vested in the *Hebdomadal Council*, a body consisting of twenty-two persons, of whom four are *ex officio* members (the chancellor, the vice-chancellor, and the two proctors), and the other eighteen are elected, viz., six from the heads of houses, six from the professors, and six from masters of arts of not less than five years' standing; and that, under the 19 & 20 Vict. c. 88 ("The Cambridge University Act, 1856,") the government of the university of Cambridge is, in like manner, vested in the *Council of the Senate*, consisting of eighteen persons, of whom two are *ex officio* members (the chancellor and the vice-chancellor), and the other sixteen are elected, viz., four heads of colleges, four professors, and eight other members of the senate. As to these universities, see also 19 & 20 Vict. cap. xvii.; 20 & 21 Vict. c. 25; 21 & 22 Vict. cc. 11, 44; 22 & 23 Vict. c. 19; 23 & 24 Vict. cc. 59, 91; 25 & 26 Vict. c. 26; 32 & 33 Vict. c. 20; 40 & 41 Vict. c. 48 ("The Universities of Oxford and Cambridge Act, 1877"); 43 & 44 Vict. c. 11; and 57 & 58 Vict. cap. lx.

[Of this kind are hospitals for the maintenance of the poor, sick, and impotent; also, all colleges, both in our universities and out of them (*m*), such colleges being founded for two purposes: 1. For the promotion of piety and learning, by proper regulations and ordinances; and 2. For affording assistance to the members of those bodies, in order to enable them to prosecute their devotion and studies with greater ease and assiduity. And all these eleemosynary corporations, though in some things partaking of the nature of ecclesiastical bodies, are, strictly speaking, lay and not ecclesiastical, even though composed of ecclesiastical persons (*n*).] And accordingly they are not subject to the jurisdiction of the Ecclesiastical Courts, or to the visitation of the ordinary (or diocesan) in his spiritual character (*o*).

Having thus marshalled the several species of corporations, let us next proceed to consider—I. How corporations may be created. II. Their powers, capacities, and incapacities. III. How corporations are visited. IV. How they may be dissolved.

I. [Corporations appear to have been created under the civil law by the mere voluntary association of their members, provided that the object of the association was not contrary to law, for then it would have been *illicitum collegium* (*p*); but in England, and according to the English law, the sovereign's consent is absolutely necessary to the erection of any corporation. The consent of the crown may be either *implied* or *express*. The consent is implied in corporations which exist by force of the *common law*, former kings being supposed to have given their consent to these; and of this sort are the sovereign himself;

(*m*) Such as the colleges at Eton, Winchester, and elsewhere. As to Eton, see 19 & 20 Vict. c. 88; 36 & 37 Vict. c. 62.

(*n*) 1 Bl. Com. 470; Philips *v.* Bury, 1 Ld. Raym. 6.

(*o*) Christian's Blackstone, vol. i. p. 472 (note).

(*p*) Ff. 47, 22, 1.

[also, all ecclesiastical corporations sole, such as bishops, parsons, and other incumbents of churches. And this incorporation is so inseparably annexed to the offices of the crown, and of these several dignitaries, that we cannot frame a complete legal idea of any of these persons, but we must also at the same time have an idea of a corporation, capable of transmitting its rights to its successors. The crown's consent is also presumed in the case of corporations by *prescription*, such as the city of London and many others, which have existed as corporations, time whereof the memory of man runneth not to the contrary; and therefore are looked upon in law to be well created (*q*). The consent of the crown, when *express*, may be given either by Act of Parliament or by charter; the authority of parliament, as regards the creation of corporations, having been usually exercised only in recognition and corroboration of, or in aid of, but sometimes in regulation of, the royal prerogative (*r*). Thus, the charter of the Royal College of Physicians, (of the tenth year of Henry the eighth,) was confirmed by the statute 14 & 15 Hen. VIII. c. 5 (*s*). Again, the corporation of the Bank of England was created by the crown, under the regulative provisions of the Act 5 & 6 Will. & Mary, c. 20. And again, by the Act 5 & 6 Will. IV. c. 76, as amended by the 40 & 41 Vict. c. 69, it was enacted, that, upon petition of the inhabitant householders of any borough in England or Wales, the king might, by his charter, incorporate such borough according to the provisions of the Acts;] and it is in that way, that municipal corporations continue to be created, under the Municipal Corporations

(*q*) 2 Inst. 330.

(*r*) See 1 Vict. c. 73, amended by the 47 & 48 Vict. c. 56 ("An Act to declare the Law relating to the Incorporation of Chartered Companies"). And by the College Charter Act, 1871 (34 & 35 Vict. c. 63), the crown's charter for the foundation of any new college or university is to be laid before parliament for a period of not less than thirty days before the report of the Privy Council thereon is submitted to her Majesty.

(*s*) Dr. Bonham's case, 8 Rep. 107.

Act, 1882 (45 & 46 Vict. c. 50), ss. 210—218, as amended by the 56 & 57 Vict. c. 9. But the power of parliament has latterly been most frequently invoked for the incorporation of public and other trading companies; although the crown still may, and not unfrequently does, by its own charter or letters patent (subject always to the relevant Acts, if any), erect a corporation; and when such companies are erected by special Act of Parliament, the special Act usually (for the sake of brevity) incorporates one or more of the relevant general Acts noted below (*t*). The special Act also defines, of course, the objects for which the company is incorporated; and confers special powers on the company, and in general limits a time within which these powers are to be exercised; and the Act may impose such other restrictions (as to the deposit of money by way of securing the due exercise of the powers or otherwise) as the nature of the case may render expedient (*u*).

[The creation by the crown of a body corporate may be performed by the words *creamus*, *erigimus*, *fundamus*, *incorporamus*, or the like; nay, it has been held that if the

(*t*) The Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16); The Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18); The Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20); The Commissioners Clauses Act, 1847 (10 & 11 Vict. c. 16); The Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17); The Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27); and The Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34); some of which Acts have also since been variously amended, namely, The Companies Clauses Consolidation Act, 1845, by 52 & 53 Vict. c. 37, repealing the 51 & 52 Vict. c. 48; The Lands Clauses Consolidation Act, 1845, by 23 & 24 Vict. c. 100, 32 & 33 Vict. c. 18, and 46 & 47 Vict. c. 15; and The Waterworks Clauses Act, 1847, by 26 & 27 Vict. c. 93. See also The Telegraphs Act, 1863 (26 & 27 Vict. c. 112), amended by 29 & 30 Vict. c. 3; The Companies Clauses Act, 1863 (26 & 27 Vict. c. 118); The Railway Companies Powers Act, 1864 (27 & 28 Vict. c. 120); The Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121); and The Companies Clauses Act, 1869 (32 & 33 Vict. c. 48).

(*u*) 9 Vict. c. 20; 55 & 56 Vict. c. 27.

[crown grants to a set of men to have *gildam mercatoriam*, a mercantile meeting or assembly (*x*), this is also sufficient to incorporate and establish them for ever (*y*).

The crown, (it is said,) may grant to a subject the power of erecting corporations, though the contrary was formerly held (*z*). That is, it may permit the subject to name the persons and powers of the corporation at his pleasure; but it is really the sovereign that erects, and the subject is but the instrument: for, though none but the crown can make a corporation, yet *qui facit per alium, facit per se;* and in this manner, the Chancellor of the University of Oxford has power by charter to erect corporations; and he has actually exercised this power, by the erection of matriculated companies of tradesmen subservient to the students.

When a corporation is erected a name is always given to it; or, supposing none to be actually given, a name will attach to it by implication (*a*); and by that name alone it must sue and be sued, and do all legal acts. Yet a very minute variation therein is not material; and the name is capable of being changed, by competent authority (*b*), without affecting the identity or capacity of the corporation in other respects (*c*). But some name is of the very being

(*x*) *Gild* signified among the Saxons a fraternity, and was derived from the verb ȝilðan, to pay, because every man paid his share towards the expenses of the community. Such of these gilds as were commercial gradually took the shape of our present municipal corporations; whose place of meeting, it may be observed, is still called the *Guild-hall*. Some curious information as to the Anglo-Saxon gilds or clubs will be found in Turner's Hist. Ang.-Sax. vol. iii. p. 98, 6th ed.; where mention is made, among other instances, of a gild of the clergy at Canterbury, and a gild of thegns at Cambridge.

(*y*) 10 Rep. 30; 1 Roll. Ab. 513.

(*z*) Bro. Ab. tit. Prerog. 53; Vin. Prerog. 88, pl. 76; Year Book, 2 Hen. 7, 13; R. *v.* Coopers' Company, 7 T. R. 548.

(*a*) 1 Salk. 191; 1 Bl. Com. 475.

(*b*) See 25 & 26 Vict. c. 89 (Companies Act, 1862), s. 13, under which any corporation established under that Act may, by special resolution, and with the approval of the Board of Trade, change its name.

(*c*) 4 Rep. 87; and 25 & 26 Vict. c. 89, s. 13.

[of its constitution; and though it is the will of the sovereign that erects the corporation, yet the name is the knot of its combination, without which it could not perform its corporate functions (*d*); for the name of incorporation, says Sir E. Coke, is as a proper name or name of baptism: and therefore when a private founder gives his college or hospital a name, he does it only as a godfather; and by that same name, the king baptizes the incorporation (*e*).]

II. A corporation has incident thereto a variety of powers, rights, capacities, and incapacities; the greater part of which are in their nature applicable only to corporations *aggregate:* though some belong to either class. These shall be now briefly considered.

1. A corporation aggregate may sue or be sued, implead or be impleaded, grant or receive, and, in short, perform any act, by the corporate name, as a natural person may by his individual name. 2. And, as a corollary from this, a corporation is amenable to such judgments as shall be given against it in any action, in respect only of the corporate property; and not so as to fix any personal or individual liability on the corporators (*f*). 3. [The acts of a corporation aggregate must, in general, be under its common seal; for, being an invisible body, it cannot manifest its intentions by any personal act or oral discourse; and therefore it acts and speaks only by its common seal. For though the particular members may express their private consents to any act, by words or signing their names, yet this does not bind the corporation. It is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole (*g*).]

(*d*) Gilb. Hist. C. P. 182.

(*e*) 10 Rep. 28.

(*f*) The maxim of the civil law is the same: "*Si quid universitati debetur, singulis non debetur; nec quod debet universitas, singuli debent.*" Ff. 3, 4, 7.

(*g*) Dav. 44, 48; Arnold *v.* Mayor of Poole, 4 Man. & Gr. 860; Young *v.* Corporation of Leamington, 8

There are cases, however, in which convenience has introduced exceptions to this rule; *e.g.*, a corporation may (through its head) give command to a bailiff to make a distress, or may retain a solicitor (*h*); and these acts need not be authenticated under the common seal (*i*). And it has been also held, that an action will lie against a corporation on an executed contract of which it has received the benefit, although such contract was not under the common seal (*k*). 4. [A corporation aggregate may make bye-laws or private statutes for its own better government (*l*); and these, unless contrary to the laws of the land (*m*), or contrary to or inconsistent with their charter (*n*), or manifestly unreasonable (*o*), are binding on the members; for as natural reason is given to the natural body for the governing of it, so bye-laws or statutes are a sort of political reason to govern the body politic.] And this is held to be a right so much of course, that where a charter of incorporation gave to a select body of the members a power to make bye-laws as to certain specified matters, it was held that the body at large was nevertheless at liberty to legislate with regard to all matters not so specified (*p*). Every corporation, too, has a right, as of course, to alter or re-

Q. B. Div. 579; and, on app., 8 App. Ca. 517; Governor and Company of Copper Mines *v.* Fox and others, 16 Q. B. 229; Diggle *v.* London and Blackwall Railway Company, 5 Exch. 442.

(*h*) Mallam *v.* Guardians of Oxford, 2 Ell. & Ell. pp. 192, 238.

(*i*) Lutw. 1497; 1 Salk. 191.

(*k*) Smart *v.* Guardians of the West Ham Union, 10 Exch. 867; Nicholson *v.* Bradfield Union, Law Rep., 1 Q. B. 620; Austin *v.* Guardians of Bethnal Green, ib. 9 C. P. 91; South of Ireland Colliery Company *v.* Waddle, Law Rep., 3 C. P. 463; 4 C. P. 617.

(*l*) Blackstone adds that the same right was recognized by the law of the Twelve Tables at Rome. (1 Bl. Com. 476.)

(*m*) R. *v.* Coopers' Company, 7 T. R. 543; Ipswich Taylors' Case, 11 Rep. 53.

(*n*) Rex *v.* Cutbush, 4 Burr. 2204; Hoblyn *v.* Rose, 2 Bro. P. C. 329; R. *v.* Cambridge, 2 Selw. N. P. 1144.

(*o*) Piper *v.* Chappell, 14 Mee. & W. 624; Queen (The) *v.* Powell, 3 Ell. & Bl. 377.

(*p*) R. *v.* Westwood, 7 Bing. 1; S. C., 4 B. & Cress. 781; 4 Bligh, N. S. 213.

peal the bye-laws which itself has made (*q*). 5. Among the incidents of a corporation aggregate may also be classed the *disabilities* to which it is subject; and these may be compendiously stated as follows. [It must always appear in court by attorney, for it cannot appear in person, being, as Sir E. Coke remarks, invisible, and existing only in intendment and consideration of law (*r*). It cannot be executor or administrator, nor, indeed, perform any personal duties. Nor can it be seised of lands to the use of another; for such kind of confidence is foreign to the end of its institution (*s*).] And, as the general rule, it can be guilty of no crime in its corporate capacity (*t*); and yet it is liable, in certain cases, to an indictment,—as where it allows a bridge, the repair of which belongs to it by law, to fall into decay; and it is capable of suing or being sued for breach of contract, and for many other kinds of civil injury—as, for example, a libel (*u*). [But it cannot be summoned into the ecclesiastical courts upon any account; for those courts act only *pro salute animæ* (*x*). Moreover, aggregate corporations that have by their constitution a head,—as a dean, warden, master, or the like,—cannot do any acts during the vacancy of the headship, except only the appointing of another; neither are they

(*q*) R. *v.* Ashwell, 12 East, 22.

(*r*) Hence, contrary to the rule as to individuals, a corporation might obtain discovery of documents on the affidavit of their solicitor. (Kingsford *v.* Great Western Railway Company, 16 C. B. (N. S.) 761.) Under the present practice, when a corporation is required to make such discovery, the court orders some specified member or officer of the corporation to make the discovery. (Order xxxi. r. 5; Berkeley *v.* Standard Discount Co., 13 Ch. Div. 97; Mayor of Swansea *v.* Quirk, 5 C. P. D. 106.)

(*s*) Bro. Abr. tit. Feoffment al Uses, 40; Bac. on Uses, 347.

(*t*) 1 Bl. Com. 476. See The Queen *v.* Pocock, 17 Q. B. 34; Stevens *v.* Midland Railway Company, 10 Exch. 352.

(*u*) Whitfield *v.* The South-Eastern Railway Company, 1 Ell. B. & Ell. 115; Yarborough *v.* The Bank of England, 16 East, 2; Green *v.* The London Omnibus Company, 7 C. B. (N. S.) 290.

(*x*) Blackstone adds (vol. i. p. 477), "Neither can it be excommunicated, for it hath no soul, as is gravely observed by Sir E. Coke, 10 Rep. 32."

[then capable of receiving a grant; for such a corporation is incomplete without its head (*y*). But there may be a corporation aggregate constituted without a head; as, for instance, the collegiate church of Southwell in Nottinghamshire, which consists only of canons (*z*): and the governors of the Charter-house, London, who have no president or superior, but are all of equal authority. 6. Another incident of corporations aggregate is, that the act of the major part is esteemed the act of the whole. By the civil law, the major part must have consisted of two-thirds of the whole; else no act could be performed (*a*): which perhaps may be one reason why they required three at least to make a corporation; but with us, *any* majority is sufficient to determine the act of the whole body (*b*). And whereas, notwithstanding the law stood thus, some founders of corporations had made statutes in derogation of the common law,—making, very frequently, the unanimous assent of the society to be necessary to any corporate act, (which King Henry the eighth found to be a great obstruction to his favourite scheme of obtaining a surrender of the lands of ecclesiastical corporations,)—it was therefore enacted, by stat. 33 Hen. VIII. c. 27, "that all private statutes shall be utterly void, "whereby any grant or election made by the head, with "the concurrence of the major part of the body, is liable "to be obstructed by any one or more being the minority;" but this statute extends not to any negative or necessary voice given, by the founder, to the head of any such society.] 7. It is also incident to corporations aggregate to have the power of electing their own members and

(*y*) Co. Litt. 263, 264.

(*z*) In Blackstone's time these canons were termed *prebendaries* (1 Bl. Com. p. 478); but see now 3 & 4 Vict. c. 113, s. 1. As to the suspension of canonries or prebends at Southwell, see 3 & 4 Vict. c. 113, ss. 18, 36, 41; 4 & 5 Vict. c. 39, s. 12.

(*a*) Ff. 3, 4, 3.

(*b*) Bro. Abr. Corporation, 31, 34; Cotton *v.* Davies, 1 Str. 53; Oldknow *v.* Wainwright, 2 Burr. 1017.

officers, and of thus perpetuating their own succession. When this power is not specially assigned by the charter to a particular portion of the members, it belongs to the major part of the corporation duly assembled for the purpose. It may in general be delegated, however, by a bye-law, to a select body of the corporators; who then become the representatives, as regards this matter, of the whole community (*c*). But though (to prevent confusion) the number of electors may be thus restrained, on the other hand the number of persons from amongst whom the choice is to be made cannot be diminished by a bye-law (*d*). 8. [It is also incident to corporations aggregate, that they may take *goods and chattels* for the benefit of themselves and their successors, just as natural persons may for themselves, their executors and administrators; but a sole corporation cannot take goods in his corporate capacity; because such moveable property is liable to be lost or embezzled, and would raise a multitude of disputes between the successor and executor; which the law is careful to avoid (*e*). Yet here a considerable distinction must be made. For if such sole corporation be the representative of a number of persons; as the master of a hospital, who is a corporation for the benefit of the poor brethren; or the dean of some antient cathedral, who stands in the place of, and represents, in his corporate capacity, the chapter; such sole corporations as these have, in this respect, the same powers as corporations aggregate, and may take personal property or chattels in succession; and the law was the same, before the Reformation, as regards an abbot or prior who represented the whole convent. And, therefore, a bond to such a master, or dean, and his successors, is good in law; and the successor shall have the advantage of it, for the benefit of the aggregate society of which he is in law the representative (*f*).

(*c*) Rex *v.* Spencer, 3 Burr. 1827.
(*d*) Ibid. 1833.
(*e*) Co. Litt. 46; 1 Bl. Com. p. 478.
(*f*) Dyer, 48; Byrd *v.* Wilford, Cro. Eliz. 464.

[Whereas, in the case of sole corporations, which represent no others but themselves, as bishops, parsons, and the like, no chattel interest can regularly go in succession: and therefore, if a lease for years be made to the Bishop of Oxford and his successors, in such case his executors or administrators, and not his successors, shall have it (*g*).] As to *land* and other real property the law is different: for corporations, whether aggregate or sole, may purchase land and hold the same to them and their successors, as natural persons may hold to them and their heirs (*h*); though their power of holding land is subject to the provisions of the statutes of mortmain, of which we have spoken in a former place (*i*); and aggregate corporations are also, in general, subject to restrictions with regard to the alienation of their lands, a point to which we have also had occasion elsewhere to refer more at large (*k*).

These incidents belong, as of course, to all bodies corporate; and result from the very act of incorporation, without any express mention being made of them in the charter. But they do not attach to any bodies of persons unincorporated; however connected they may be in point of social position, or however united by express compact. Thus, the inhabitants of a particular parish are not capable, without being incorporated, of holding lands to them and their successors: though they are capable of receiving a general grant of incorporation, which would enable them to hold such an inheritance (*l*); but there are many parishes holding land, who cannot show any incorporation of the parishioners (*m*). And though a voluntary society of

(*g*) Co. Litt. ubi sup.

(*h*) The Case of Sutton's Hospital, 10 Rep. 30.

(*i*) Vide sup. vol. I. pp. 425—438.

(*k*) Vide sup. vol. I. p. 444.

(*l*) Ashby *v.* White, Lord Raym. 951; S. C., 3 Salk. 18; 12 Rep. 121.

(*m*) Att.-Gen. *v.* Webster, Law Rep., 20 Eq. Ca. 483; Ex parte Vaughan, Law Rep., 2 Q. B. 114; In re Campden Charities, 18 Ch. Div. 310; 59 Geo. 3, c. 12, ss. 12, 17, 24, 25; 5 & 6 Will. 4, c. 69, s. 5; 5 & 6 Vict. c. 18; 22 Vict. c. 27, s. 4; 39 & 40 Vict. c. 62; 45 & 46 Vict. c. 15.

individuals should unite together by mutual agreement for common purposes, should provide a common stock by subscription, and should subject themselves to laws of their own creation for the government of their society,—yet all this will not entitle them to the privilege of suing or being sued in their social capacity, or protect them from individual liability (*n*). Indeed, it has been held, that for any persons to assume to themselves the character of a corporation, and to attempt to act and to hold themselves out as such without a charter,—is an invasion of the royal prerogative, and in the nature of a criminal offence at the common law (*o*).

It is obvious, that some of the characteristics above pointed out as belonging to corporations,—particularly that of the members being exempt from personal and individual liability,—operate strongly to the advantage of persons associated in great numbers for common objects, and more especially for objects of a commercial kind. Yet, as the law stood until a recent period, the only method by which these privileges, or any of them, could be obtained by any association of persons, was that of procuring itself to be formed into a corporation; and this could be done (as we have seen) only by Act of Parliament or by royal charter; while, on the other hand, when such incorporation was once obtained, these privileges all attached as of course, and without any exception or restriction, to these persons and their successors for ever. This state of things gave rise, as the spirit of commercial enterprise advanced, to great dissatisfaction among large classes of the community; there being many cases in which the solicitation of associated persons to be formed into a body corporate, with all its attendant privileges, was found to be ineffectual, owing to the caution exercised both by parliament and the advisers of the crown, with reference to this subject;—a caution suggested by the fact, which experience has so fully established, that

(*n*) Attwood *v.* Small, 7 B. & C. 390; Todd *v.* Emly, 8 Mee. & W. 505; et sup. vol. II. p. 103.

(*o*) Duvergier *v.* Fellowes, 5 Bing. 248; 10 B. & C. 826.

the enterprises of such associations are sometimes of rash or fraudulent conception, and of ruinous consequences to those who are tempted to become subscribers. The desire, however, to obviate this dissatisfaction, as far as consistent with the welfare of the public at large, at length induced the legislature to make the experiment, of authorizing the crown to create bodies corporate or quasi-corporate to which some only of these common-law privileges should attach, or to which they should attach in a partial or modified sense, or which should be for a limited period only, or subject in some other respects to restrictive regulation.

Accordingly, by the 7 Will. IV. & 1 Vict. c. 73, amended by the 47 & 48 Vict. c. 56, her Majesty was empowered, by *letters-patent*, to grant to any company or body of persons, associated for any trading or other purposes whatever, any privileges which, according to the common law, it would have been competent to the crown to grant to any such company by charter of incorporation—and this, without incorporating such persons. And in the same spirit, but with still more departure from the principles of the common law, have been since passed a variety of Acts to facilitate the formation of *Joint Stock Companies:* which companies may perhaps be accurately defined as *qualified* corporations, constituted neither by charter, nor by Act of Parliament, nor by letters-patent, but by the action of the members themselves, by proceedings taken by them under and in pursuance of the provisions of the Acts, whereby they acquire their validity; and of these Acts, the principal are the following:—The 25 & 26 Vict. c. 89, ("The Companies Act, 1862,")—the 30 & 31 Vict. c. 131, ("The Companies Act, 1867,")—and the 53 & 54 Vict. cc. 62 & 63, ("The Companies, Memorandum of Association, Act, 1890," and "The Companies, Winding-up, Act, 1890,")—in which statutes most of the existing provisions on this subject will be found,—some few of these provisions having been amended in certain particulars by the 33 & 34 Vict. c. 104, the 40 & 41 Vict. c. 26, the 42 & 43

Vict. c. 76, the 43 Vict. c. 19, the 53 & 54 Vict. c. 64, and the 56 & 57 Vict. c. 58 (*p*). Of these provisions, the first which invites attention, is a general one which declares, that any *seven* or more persons associated for any lawful purpose, may, by subscribing their names to a Memorandum of Association (*q*), and otherwise complying with the requisitions of the Acts in respect of registration, form themselves into an incorporated company, with or without limited liability; and it is expressly provided, that the Memorandum of Association *may*, in the case of a company "limited by shares," and *shall*, in the case of a company "limited by guarantee," or "unlimited," be accompanied, when registered, by *Articles of Association*, signed by the subscribers to the Memorandum of Association, and prescribing such regulations for the company as they deem expedient (*r*). And no company or association, consisting of more than *twenty* persons, can be formed for the purpose of carrying on any business that has for its object the acquisition of gain to the association or to the individual members thereof, *unless* it is registered under the Acts (*s*),—this provision, of course, not extending to any company or association formed in pursuance of some other Act or of letters-patent; and not extending to any mining company within and subject to the jurisdiction of the Stannaries. Upon due registration, the Registrar of Joint Stock Companies—an officer appointed by and acting

(*p*) See also the 46 & 47 Vict. c. 30, providing for English companies establishing branch registers in the colonies; the 49 Vict. c. 23, containing certain provisions applicable to the winding up of companies whose registered office is in Scotland; and the 51 & 52 Vict. c. 62 (and, as to companies within the Stannaries, the 50 & 51 Vict. c. 43), providing for the payment of wages and salaries in priority, upon a winding up, these last-mentioned provisions being in lieu of the like provisions contained in the repealed Act 46 & 47 Vict. c. 28.

(*q*) 25 & 26 Vict. c. 89, s. 6.

(*r*) Sect. 14.

(*s*) 25 & 26 Vict. c. 89, s. 4; Sykes *v.* Beadon, 11 Ch. Div. 170; Smith *v.* Anderson, 15 Ch. Div. 247; and In re Siddall, 29 Ch. D. 1.

under the superintendence of the Board of Trade (*t*),—is to certify, under his hand, that the company is incorporated; and in the case of a "limited" company, that it is "limited" (*u*); and thereupon the members become a body corporate, by the name contained in the memorandum of association, capable of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, with power to hold lands (*x*); and with power also to each member to transfer his interest without the consent of the rest (*y*): and the certificate of incorporation is made conclusive evidence that the requisitions as to registration have been duly complied with (*z*). A company which has been incorporated in this manner is managed by a body of directors appointed by the members; and the capital or joint stock of the company is the measure of its corporate liability. And here we will observe, that the amount of such capital is to be specified in the original memorandum of association of the company; but by the 30 & 31 Vict. c. 131, and 40 & 41 Vict. c. 26, a limited company may, under certain restrictions, *reduce its capital*, or cancel any capital which shall have been lost, or which shall consist of unissued shares; and may also *divide* its capital into shares of a smaller amount than was fixed by its original memorandum of association. Also, by the 42 & 43 Vict. c. 76, s. 3, an unlimited company, on registering (which

(*t*) 25 & 26 Vict. c. 89, s. 174.

(*u*) As the general rule, the word "limited" must be used by any company registering itself as one with limited liability. An exception, however, is made by 30 & 31 Vict. c. 131, s. 23, in favour of any limited company, formed to promote "commerce, art, science, religion, or any other useful object," and not for individual gain, and licensed by the Board of Trade to be registered without the addition of the word "limited" to its name.

(*x*) 25 & 26 Vict. c. 89, s. 18. But no company, formed for the purpose of promoting *art*, *science*, *religion*, *charity*, or any other like object (not involving the acquisition of gain by the company, or by the individual members thereof), shall, without the written licence of the Board of Trade, hold more than two acres of land. (Sect. 21.)

(*y*) Sects. 22—24; 30 & 31 Vict. c. 131, s. 26.

(*z*) 25 & 26 Vict. c. 89, ss. 17, 18.

it may under that Act do) as a limited company, may increase its capital; and by the 43 Vict. c. 19, a company may (out of its accumulated profits) return to the members portion of the paid-up capital, correspondingly increasing, in such case, the amount of its unpaid capital. And the liability of the individual members of the company is (in effect) limited by the amount of the unpaid capital owned by them respectively; and as to such individual liability, the rule is (*a*),—that, in the event of the company being wound up, every present and past member thereof shall be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities, and the costs, charges, and expenses of its winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, but with certain qualifications, and (amongst others) the following: 1. That no past member shall be liable, if he has ceased to be a member for one year or upwards, prior to the commencement of the winding-up (*b*); —2. That no past member shall be liable, in respect of any debt or liability of the company contracted after he ceased to be a member;—3. That no past member shall be liable, unless it appears to the court before which the winding-up takes place, that the existing members are unable to satisfy the contributions required to be made by them;—and, 4. That, in the case of a company *limited by shares*, no contributions shall be required from any member, exceeding the amount (if any) unpaid on the shares in respect of which he is liable as a present or past member (*c*). It results, therefore, that in the case of a "limited" company (*d*), the members are made liable to the amount (if

(*a*) 25 & 26 Vict. c. 89, s. 38; and see ss. 7—10.

(*b*) Barned's Banking Company, Law Rep., 3 Ch. App. 161.

(*c*) Cleland's case, Law Rep., 14 Eq. Ca. 387; In re British Farmers' Pure Linseed Cake Co., 7 Ch. D. 533.

(*d*) The text refers only to companies "limited" *by shares;* but there may also be companies "limited" *by guarantee;* in which

any) unpaid on the shares respectively held or once held by them, while, in the case of an "unlimited" company, the liability of each member thereof remains unlimited. On this rule, however, an important modification has been engrafted, with reference to the liability of the directors as distinct from that of the ordinary members,—it being enacted, by 30 & 31 Vict. c. 131, s. 4, that the memorandum of association of a "limited" company, either as originally framed or as subsequently altered by special resolution, may provide that the liability of the directors, managers, or managing director thereof, shall be *unlimited;* in which case, each of the directors or managers shall, subject to certain restrictions specified in the Act (*e*), be liable to contribute, in the event of a winding-up, as if he were a member of an unlimited company. Also, with regard to banking companies which have a note-issue, it is provided, by the 42 & 43 Vict. c. 76, s. 6, that, though they register with limited liability, the members shall, to the extent of the note-issue, remain liable as ordinary partners would be, that is, to an unlimited extent.

And here we will observe, that the objects for which the company is established, require to be stated in the original memorandum of association; and usually these objects may not be altered; but now, by the 53 & 54 Vict. c. 62, the company may, by special resolution and with the sanction of the court, modify its objects in certain particulars, calculated for the more advantageous conduct or for the extension of the business of the company, or for its more convenient and economical management (sects. 1, 2).

And regarding the winding-up of a company thus established, it is to be remarked, that any person to whom the company is indebted in a sum exceeding 50*l.*, then due, and who has served on the company, by leaving the

latter case, the liability of each member is co-extensive with the amount he has undertaken to contribute in the event of the company being *wound up.* (25 & 26 Vict. c. 89, ss. 9, 38.)

(*e*) 30 & 31 Vict. c. 131, ss. 5, 8.

same at their registered office, a demand under his hand requiring the company to pay the debt, may, if he obtains no satisfaction within three weeks, take proceedings to have the company wound up (*f*); and such course may also be taken by any creditor, if execution or other process, issued on a judgment, decree, or order obtained in his favour, is returned unsatisfied by the officer who had to levy under it (*g*). The application for the winding-up order is to be made by petition in the Chancery division,—or (in certain cases) in the County Court (*h*); and the winding-up is deemed, in general, to commence with the presentation of such petition; and immediately on the winding-up order being made, the official receiver becomes the provisional liquidator of the company (*i*); and he may become or continue the permanent liquidator; or the court will appoint some third party to be the liquidator; which third party was (and is) required to be a man of integrity and special aptitude, and used to be called the "*official liquidator*" (*k*); and the liquidator takes into his custody all the property, effects, and things in action of the company, and deals with them by sale or otherwise as the court shall sanction, and generally does all such other things as may be necessary for winding up the affairs of the company and for distributing its assets (*l*). And the court in due course proceeds to settle a list of *contributories*—or persons liable as members to contribute to the assets of the company (*m*),—and to make *calls* on all or any of the contributories (to the extent of their liability), for payment of the sums necessary to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves (*n*); and, as soon as the

(*f*) 25 & 26 Vict. c. 89, ss. 79, 80.
(*g*) Ibid.
(*h*) Sects. 81, 82; 53 & 54 Vict. c. 63, s. 1.
(*i*) 53 & 54 Vict. c. 63, s. 4; c. 131, s. 41.
(*k*) 25 & 26 Vict. c. 89, s. 92.
(*l*) Sects. 94, 95.
(*m*) Sects. 38, 74, 98.
(*n*) 25 & 26 Vict. c. 89, s. 102.

affairs of the company have been completely wound up, the Court makes an order that the company be dissolved (*o*).

To this general view of the subject of winding-up, however, it must be added, that, whenever a company is unable to pay its debts (and in some other cases also), a petition for winding-up may be presented by the company itself, or by a contributory or contributories, as well as by a creditor or creditors, or by all or any of such parties in conjunction (*p*); but as regards the right of a contributory to present the petition, it is provided, by the 30 & 31 Vict. c. 131, s. 40, that such right shall be restricted to cases where the members of the company have become less in number than seven; or where such contributory is an original allottee; or has held his shares for a certain period; or where such shares have devolved on him through the death of a former holder. There may also be a *voluntary* winding-up; and that is, where the company passes the prescribed resolution (*q*) for the purpose (*r*),—of which the effect is, that a liquidator is appointed by the company itself; and he settles a list of contributories, makes calls, and exercises all the powers given as above stated to the liquidator in a winding up by the court (*s*); and a voluntary winding-up is deemed to commence at the time of passing the prescribed resolution (*t*).

Lastly, we will observe, that the court may, in lieu of making an order for the compulsory winding up of the company, order that it be wound up under the supervision of the court; and such order is called a supervision order: but a compulsory order is, in general, preferable,—for many reasons, and more especially where matters affecting the directors and officers of the company require to be investigated,—a proceeding which used to take place under sect. 165 of the Companies Act, 1862, but now takes place under sect. 10 of the Companies Act, 1890;

(*o*) Sect. 111.
(*p*) Sects. 79—82.
(*q*) 25 & 26 Vict. c. 89, s. 51.
(*r*) Sect. 129.
(*s*) Sect. 133.
(*t*) Sect. 130.

or when proceedings are to be taken against promoters and others, either under the 30 & 31 Vict. c. 131, s. 38, or under the 53 & 54 Vict. c. 64, on the ground of any alleged frauds contained in any prospectus or notice issued by them.

III. Returning from this digression as to qualified corporations, we proceed next to inquire how corporations at common law may be *visited*. [For corporations, being composed of individuals subject to human frailties, are liable, as well as private persons, to deviate from the ends of their institution; and for that reason, the law has provided proper persons to visit, inquire into, and correct all irregularities that may arise in them.

With regard to all ecclesiastical corporations, the ordinary is their visitor, so constituted by the canon law, and from thence derived to us. The pope formerly, and now the crown, as supreme ordinary, is the visitor of the archbishop or metropolitan: the metropolitan has the charge and coercion of all his suffragan bishops: and the bishops, in their several dioceses, are in ecclesiastical matters the visitors of all deans and chapters, of all rectors and vicars, and of all other spiritual corporations (*u*).]

With respect to lay corporations of the eleemosynary kind, the founder, his heirs or assigns, are the visitors; for in a lay incorporation the ordinary cannot visit (*x*); and if the sovereign and a private man join in endowing an eleemosynary foundation, the sovereign alone shall be the founder of it; for here the royal prerogative prevails. The founder has also a right to appoint a visitor, and to limit the jurisdiction that he is to possess; and if the heirs of a private founder fail, and no visitor has been appointed by him, the right of visitation devolves, in such

(*u*) Re Dean of York, 2 Q. B. 1; Reg. *v.* Dean of Rochester, 17 Q. B. 1.

(*x*) 1 Bl. Com. p. 480.

case, upon the crown, and is exercised on behalf of the crown by the Lord Chancellor, sitting as the representative of the sovereign (*y*).

As to a civil lay incorporation, it has no visitor, in the sense of the term here intended—but the misbehaviours of all bodies corporate of this class are inquired into and redressed, and their controversies decided, in the High Court of Justice, Queen's Bench Division (*z*). [And accordingly, in the case of the College of Physicians, though the king by his letters-patent had subjected that body to the visitation of four very respectable persons,—the Lord Chancellor, the two Chief Justices, and the Chief Baron,—though the college had accepted this charter with all possible marks of acquiescence, and had acted under it for more than a century,—yet, in 1753, the authority of this provision coming into dispute, on an appeal preferred to these supposed visitors, they directed the legality of their own appointment to be argued; and, as this college was merely a civil and not an eleemosynary foundation, they at length determined, after several days' solemn debate, that they had no jurisdiction as visitors; and remitted the appellant, (if aggrieved,) to his regular remedy, in the King's Bench (*a*).

With regard to *hospitals*, these were all of them considered, by the popish clergy, as of mere *ecclesiastical* jurisdiction: however, the laws of the land judged otherwise; and with regard to these institutions, it has long been held, that, if the hospital be spiritual, the bishop shall visit—but if lay, the patron (*b*). The right of lay patrons was indeed abridged by the statute 2 Hen. V. st. 1, c. 1, which ordained that the ordinary should visit *all* hospitals founded by subjects; though the king's right was reserved to visit, by his commissioners, such as were of royal foun-

(*y*) Rex. *v.* Catherine Hall, 4 T. R. 233; Ex parte Wrangham, 2 Ves. jun. 609.

(*z*) Phillips *v.* Bury, Ld. Raym. 8.

(*a*) 1 Bl. Com. p. 482.

(*b*) Year Book, 8 Edw. 3, 28; 8 Ass. 29.

[dation. But the subject's right was in part restored by 14 Eliz. c. 5, which directs the bishops to visit such hospitals only where no visitor is appointed by the founders thereof: and all the hospitals founded by virtue of the statute 39 Eliz. c. 5, are to be visited by such persons as shall be nominated by the respective founders; but still, if the founder appoints nobody, the bishop of the diocese must visit (*c*).

Colleges, as distinguished from *Universities*, are also eleemosynary corporations; though they were considered by the popish clergy as *ecclesiastical*, or, at least, as clerical corporations; and therefore the right of visitation was claimed by the ordinary of the diocese. This is evident, because in many of our most antient colleges, when the founder had a mind to subject them to a visitor of his own nomination, he obtained for that purpose a papal bull to exempt them from the jurisdiction of the ordinary: several of which bulls are still preserved in the archives of the respective societies. And in some of the colleges of Oxford, where no special visitor is appointed, the Bishop of Lincoln, in whose diocese Oxford was formerly comprised, has immemorially exercised visitorial authority; which can be ascribed to nothing else but his supposed title as ordinary to visit these, among other, ecclesiastical foundations (*d*).] But it is now well established law, that colleges are *lay* corporations, though sometimes totally composed of ecclesiastical persons (*e*); and that, where the founder has appointed no other visitor, and his heirs become extinct, the right of visitation belongs to the crown; and is exercised by the Lord Chancellor, as the crown's representative.

So much with respect to the persons by whom the different classes of corporations are respectively to be visited; nextly, with respect to a visitor's duties:—It may

(*c*) 2 Inst. 725.
(*d*) 1 Bl. Com. 483.
(*e*) Phillips *v.* Bury, Ld. Raym. 8.

be laid down generally, that the visitor is to control all irregularities in the institution over which he presides, and to decide and give redress in all controversies arising among the members, as to the interpretation of their laws and statutes (*f*)—that, in the exercise of these duties, he is to be guided by the intentions of the founder, so far as they can be collected from the statutes or from the design of the institution—that, as to the course of proceeding, he is restrained to no particular forms (*g*),—and that, while he keeps within his jurisdiction, his determinations as visitor are final, and examinable in no other court whatsoever (*h*); [but it is said, that where the founder of an eleemosynary foundation appoints a visitor, and limits his jurisdiction by rules and statutes, if the visitor in his sentence exceeds these rules, an action lies against him; but that it is otherwise, where he mistakes in a thing within his power (*i*).

IV. We come now, in the last place, to consider how corporations may be dissolved. Any particular member of a corporation may be disfranchised or lose his place therein, by acting contrary to the laws of the society, or to the laws of the land; or he may resign it by his own voluntary act (*k*). But the body politic may also itself be dissolved in several ways—which dissolution is the civil death of the corporation: and in this case, their lands and tenements shall revert to the person, or his heirs, who granted them to the corporation; for the law doth annex a condition to every such grant, that, if the corporation be dissolved, the grantor shall have again the lands, because

(*f*) Dr. Lee's case, 1 Ell. Bl. & E. 863.

(*g*) Bishop of Ely *v.* Bentley, 2 Bro. & C. 220; R. *v.* Bishop of Ely, 2 T. R. 290; Re Dean of York, 2 Q. B. 1.

(*h*) Salk. 403; Carth. 180; St. John's College *v.* Toddington, 1 Burr. 200; R. *v.* Bishop of Worcester, 4 M. & S. 415.

(*i*) 2 Lutw. 1566.

(*k*) 11 Rep. 98; R. *v.* Liverpool, 2 Burr. 723; R. *v.* Harris, 1 B. & Adol. 936.

[the cause of the grant faileth (*l*). The grant is indeed only during the life of the corporation, which *may* endure for ever—but when that life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of every other grant for life.] The debts of a corporation aggregate, either to or from it, are totally extinguished by its dissolution (*m*); for it has no longer a corporate character, in which to sue or be sued; and as during its existence the members of it could not recover or be charged with the corporate debts in their natural capacities, so neither can they when the corporation has ceased to exist.

A corporation may be dissolved—1. By the loss of such an integral part of its members as is necessary, according to its charter, to the validity of the corporate elections; for in such cases, the corporation has lost the power of continuing its own succession, and will accordingly be dissolved by the natural death of all its members (*n*); unless indeed its resurrection is otherwise provided for by statute (*o*). 2. [By surrender of its franchises into the hands of the sovereign, which is a kind of suicide. 3. By forfeiture of its charter, through negligence or abuse of its franchises; in which case, the law judges that the body politic has broken the condition upon which it was incorporated, and thereupon the incorporation is void (*p*); and the regular course, in such case, is to bring an information in the nature of a writ of *quo warranto*,—to inquire by what warrant the members now exercise their corporate power, having forfeited it by such and such proceedings. The exertion of this act of law for the purposes of the state, in the reigns of King Charles and King James the second,—

(*l*) Co. Litt. 13.

(*m*) Edmunds *v.* Brown, 1 Lev. 237.

(*n*) R. *v.* Pasmore, 3 T. R. 199; R. *v.* Miller, 6 T. R. 268; R. *v.* Morris, 3 East, 813; S. C., 4 East, 17.

(*o*) 11 Geo. 1, c. 4; 45 & 46 Vict. c. 50.

(*p*) R. *v.* Ponsonby, 1 Ves. jun. 8; Eastern Archipelago Company *v.* The Queen, 2 Ell. & Bl. 856.

[particularly by revoking the charter of the city of London,—gave great and just offence; though perhaps in strictness of law, the proceedings in most of the cases that occurred were sufficiently regular. But the judgment against the charter of London was reversed by Act of Parliament after the Revolution; and by the same statute, it was enacted, that the franchises of the city of London should never more be forfeited for any cause whatever (*q*),]—*scil.*, except by virtue of some new Act of Parliament.

(*q*) 2 W. & M. c. 8; R. *v.* Amery, 2 T. R. 515; 4 T. R. 122.

SECTION II.

OF MUNICIPAL CORPORATIONS; AND OF COUNTY COUNCILS, AND PARISH COUNCILS.

We have already remarked, that there is a species of lay corporation, which is erected for the good government of a town. An institution of this kind has in modern times been termed a *municipal corporation;* and may be defined generally as a body politic or corporate, established in some town to protect the interests of its inhabitants as such, and for the maintenance of order therein; and consisting of the burgesses or freemen, that is, of such persons as are duly and legally admitted as members of the corporate body.

The earlier history of the incorporation of our English towns is involved in some degree of obscurity (*a*). What may be stated with certainty, however, is as follows:

First, a diligent examination of our antient historical remains appears to establish this point, that even prior to the Norman Conquest there existed, at least, the germ of municipal corporations in this country: for it appears to have been usual for such persons of free condition as were not landowners, to settle in the towns and occupy houses there, as tenants to the crown or to some inferior lord, under the name of burgesses; and (in numerous in-

(*a*) It is suggested in Robertson's Hist. Chas. V. vol. 1, p. 33, notes xv.—xviii., that the establishment of communities or corporations in England was posterior to the Conquest, "and that the practice was "borrowed from France"; but the correctness of this statement has been disputed. (Turner's Hist. Anglo-Sax. vol. iii. pp. 106, 107; Lord Lyttleton's Hist. Hen. II. vol. ii. p. 317.)

stances) to form themselves, by licence from the crown, into voluntary associations or fraternities, called *gilds*, or *guilds*; and in their capacity of burgesses, to be entitled to certain property, and to be exempt from some, and to be subject to other, specific liabilities (*b*). And soon after the Conquest, and from thence downwards to the time of Henry the sixth, or thereabouts, charters were from time to time conceded, by the Anglo-Norman kings, to the same towns (*c*), and to others, either confirming the former grants, or (as the case might be) conferring new grants; and by such charters, the boroughs were frequently demised in fee farm to the burgesses (*d*); and they were authorized to have a *guild-merchant* (*e*), and to have officers, such as mayors, aldermen, bailiffs, and the like, for the government of their towns; to hold courts of their own, for the administration of justice within their town precincts (*f*); and to enjoy many other liberties and privileges, of which it may be said, in general, that they chiefly consisted of exemptions from arbitrary taxation, and from feudal oppressions. And from about the reign of Henry the sixth, to the present day, other charters of a similar character, (though varying of course as to the nature of the specific privileges conferred,) have been repeatedly granted by our different monarchs; and in these more recent charters, there are in general contained words of express incorporation, as that the mayor, bailiff, (or other officers,) and burgesses of the particular towns, shall be "a body corporate" by the specified name, and by that name shall have perpetual succession, and be competent to sue and be sued, and the like (*g*).

(*b*) Domesday, passim.

(*c*) Introduction to Domesday, by Sir H. Ellis, vol. i. p. 191.

(*d*) Madox, Firma Burgi, p. 37.

(*e*) Thus Henry the second grants to the burgesses of Southampton, "*quod habeant et teneant gildam suam* "*et omnes libertates et consuetudines*," &c.; and King John grants to Dunwich, "*hansam et gildam mercatoriam*."—Madox, Firma Burgi, 27.

(*f*) Madox, Firma Burgi, 28, 116, 136, 139.

(*g*) Ibid. 28.

Under these different grants, a very large proportion of the different towns of England have successively become incorporated; but, until a recent period, their constitutions were in many respects defective, and of a nature liable to abuse: and being founded besides on charters (express or implied) granted by different kings at different times, were subject to a great and inconvenient variety of structure. To place therefore these important institutions upon a more uniform basis, and to purify their internal economy, it was deemed necessary in the course of the last reign, and as the result of the report thereon of a parliamentary commission appointed in 1834, to pass an Act "to regulate the municipal corporations in England and Wales," and which Act was the statute 5 & 6 Will. IV. c. 76, commonly called "The Municipal Corporation Act, 1835."

The Municipal Corporation Act, 1835, continued to regulate these institutions until the year 1882, having been in the meantime successively amended by further Acts, and particularly by the 24 & 25 Vict. c. 75, and 32 & 33 Vict. c. 55 (*h*); but in the last-mentioned year, the Act of 1835, together with the amending Acts, were repealed, and their provisions consolidated with amendments in the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50). By the last-mentioned Act,—which (subject to the provisions of the Local Government Act, 1888, hereafter mentioned) extends to all cities and boroughs (*i*) to which the Municipal Corporation Act, 1835, extended on the 1st January, 1883, and also to all towns, districts,

(*h*) The prior Municipal Corporation Acts are enumerated in the schedule to the Municipal Corporations (New Charter) Act, 1877 (40 & 41 Vict. c. 69), and also in the schedules to the Municipal Corporations Act, 1882.

(*i*) As to the *boundaries* of boroughs (municipal and parliamentary), see 2 & 3 Will. 4, c. 64; 6 & 7 Will. 4, c. 103; 7 Will. 4 & 1 Vict. c. 78, ss. 29, 41; 30 & 31 Vict. c. 102; 31 & 32 Vict. c. 46; 34 & 35 Vict. c. 67; and now sects. 228, 229 of the Act of 1882 (*municipal*), and sects. 6 to 8 of the 48 & 49 Vict. c. 23 (*parliamentary*). See also 50 & 51 Vict. c. 61; and 56 & 57 Vict. c. 9.

or places becoming incorporate after that date, and being by charter brought within its provisions,—all corporate towns are placed under one constitution and plan of administration, the key-note or governing principle of which is, that the municipalities shall manage their own affairs, by municipal councils of their own election.

And for this purpose, the Act proceeds first to define who shall be the electors of the municipal council; and by sect. 9, a *burgess* or *freeman* is defined (*k*) as a person of full age, not an alien, nor having received within the preceding twelve months parochial relief or other alms (*l*); and who on the fifteenth day of July in any year shall have occupied any house, warehouse, counting-house, shop, or other building within the borough during the whole of the preceding twelve months; and during such occupation, shall have resided within the borough, or within seven miles thereof; and shall, during such time, have been rated, in respect of such premises, to all rates for the relief of the poor, and have paid on or before the 20th of July in such year all such poor and borough rates, in respect of the same premises, as shall have been payable up to the preceding 5th of January; and he must have been duly inrolled as a burgess on the *burgess roll* (*m*); but when the qualifying premises come to the party by descent, marriage, marriage settlement, devise, or promotion to any benefice or office, the occupancy and rating of the predecessor may be reckoned as part of the twelve months (*n*).

(*k*) 45 & 46 Vict. c. 50, s. 9.

(*l*) The receipt of medical or surgical assistance from any municipal charity, or treatment in a hospital, is not a disqualification; nor is the education of the burgess's child in any public or endowed school. (45 & 46 Vict. c. 50, s. 33.)

(*m*) As to the burgess roll, see 45 & 46 Vict. c. 50, s. 45; also 5 & 6 Will. 4, c. 76, s. 22; 7 Will. 4 & 1 Vict. c. 78; 20 & 21 Vict. c. 50, ss. 6, 7; Hunt *v.* Hibbs, 5 H. & N. 123; Ex parte Hindmarch, Law Rep., 3 Q. B. 12; The Queen *v.* Tugwell, ib. 704.

(*n*) 45 & 46 Vict. c. 50, s. 33; and (as to female burgesses) s. 63, following 32 & 33 Vict. c. 55, s. 9; The Queen *v.* Harrald, L. R., 7 Q. B. 361.

And to the qualification prescribed by the Municipal Corporations Act, 1882, sect. 9, the ten pounds occupation qualification under the Registration Act, 1885, referred to in a former volume, has now been added by the County Electors Act, 1888 (*o*).

The Act also provides, that in every borough there shall be elected annually a "mayor" (*p*),—and periodically a certain number of "aldermen" and of "councillors" (*q*),—who together shall constitute "the council" of the borough (*r*);—that they shall be respectively chosen from among persons on, or entitled to be on, the burgess list (*s*), and otherwise qualified as in the Act described (*t*);—that the councillors shall be elected by the burgesses (*u*),—this election being conducted in the same manner as under the Ballot Act, 1872 (35 & 36 Vict. c. 33),—and being subject to the like provisions, as to corrupt practices and the like, as parliamentary elections are subject to,—and in the case of the larger boroughs, divided into wards, the election of the councillors for the different wards being made by the burgesses of the respective wards (*x*),—and that the mayor and aldermen shall be elected by the council (*y*);—that the council shall meet once a quarter (and oftener if due notice be given), for transaction of the general business

(*o*) 51 & 52 Vict. c. 10, s. 3.

(*p*) 45 & 46 Vict. c. 50, s. 61. By ss. 16 and 67, provision is made (following 16 & 17 Vict. c. 79, ss. 7, 8) for the death, illness, absence, or incapacity of the mayor (or other municipal officer). By 6 & 7 Will. 4, c. 105, s. 4, the mayor was to hold over after his year, till acceptance of office by his successor; and there is a similar provision in the Act of 1882, s. 15. By 3 & 4 Vict. c. 47, the mayor might be re-elected; and there is a similar provision for his re-election in the Act of 1882, s. 37.

(*q*) 45 & 46 Vict. c. 50, s. 10.

(*r*) Ibid.

(*s*) "The Parliamentary Registration Acts" (as to which vide sup. vol. II. p. 349) *mutatis mutandis* apply also to the making out and revision of the burgess list (see 41 & 42 Vict. c. 26, ss. 15, 18; 45 & 46 Vict. c. 50, ss. 44, 45; and 54 & 55 Vict. c. 68, ss. 2, 3).

(*t*) 45 & 46 Vict. c. 50, ss. 11, 12.

(*u*) Ibid.

(*x*) 45 & 46 Vict. c. 50, s. 30; Baker *v.* Marsh, 4 El. & Bl. 144; The Queen *v.* Parkinson, Law Rep., 3 Q. B. 11.

(*y*) 45 & 46 Vict. c. 50, ss. 14, 15.

of the borough (*z*), and make their decisions according to the majority of the members present (if those present amount to one third of the whole), and that the mayor, or other member presiding in his absence, shall have a casting vote (*a*);—that at any meeting the council may make bye-laws, for the good rule and government of the borough, for the prevention and suppression of nuisances, and for the imposition of fines on persons in that behalf offending (*b*);—that the burgesses shall also annually elect (*c*), from among those qualified to be councillors, two auditors and two assessors,—the former to audit the accounts of the borough, the latter to assist in revising the burgess list; and there is also to be a third auditor, appointed by the mayor, and called the mayor's auditor (*d*);—and the council may appoint a town clerk and a treasurer (neither of whom is to be a member of the council), and such other officers as have been usual or as are necessary, with power also to fix their salaries (*e*),—and, if the borough have a separate court of quarter sessions, the council might (until the Local Government Act, 1888, hereafter mentioned) have appointed a clerk of the peace (*f*), and also a coroner (*g*); but since the last-mentioned Act, the clerk of the peace is now appointed by the standing joint committee of the county council and the quarter sessions (*h*); and the coroner (in the case of quarter sessions boroughs only, which are either "county boroughs" under that Act (*i*), or have a population of 10,000 or upwards) (*k*), is appointed by the council (whether county or borough).

And as regards boroughs desiring to have a separate

(*z*) 45 & 46 Vict. c. 50, s. 22, and 2nd schedule to Act.

(*a*) Ibid.

(*b*) Ibid. s. 23.

(*c*) Ibid. s. 25.

(*d*) 45 & 46 Vict. c. 50, ss. 25, 29, 62; Searle *v.* The Queen, 8 Ell. & Bl. 22; The Queen *v.* The Mayor of Rochester, 1 E. Bl. & E. 1024.

(*e*) 45 & 46 Vict. c. 50, ss. 17, 18.

(*f*) Ibid. s. 164.

(*g*) Ibid. s. 171.

(*h*) 51 & 52 Vict. c. 41, s. 83.

(*i*) Ibid. s. 38. As to county boroughs not being quarter sessions boroughs, see 51 & 52 Vict. c. 41, s. 34.

(*k*) Ibid. s. 35.

court of quarter sessions, the Municipal Corporations Act, 1882, provides that the council of any such borough may petition the crown for that purpose (*l*); and if the application be granted, the crown will appoint a barrister at law to be recorder of the borough (*m*): and such recorder shall not only be sole judge of such court of quarter sessions, but also of the borough court of record for civil actions, if there be any,—provided that such court of record be not regulated by any Act of Parliament, and that no barrister of five years' standing sat therein as judge at the time when the Municipal Corporation Act, 1835, passed (*n*); and if the borough desire it, a stipendiary magistrate or magistrates may also be appointed for the borough (*o*). Moreover, to boroughs having a separate court of quarter sessions, the crown is empowered to grant a commission of the peace, and to nominate such persons to be justices within the borough as it shall think proper (*p*); and among such justices, the mayor (during his mayoralty), and also the recorder, are included by virtue of their offices (*q*); and in the case of such boroughs, if they were previously exempt from the jurisdiction of the county justices by reason of a *non-intromittant* clause in their charter (*r*), they continue to be so exempt, but otherwise the county

(*l*) 45 & 46 Vict. c. 50, s. 162.

(*m*) Ibid. ss. 163, 165, by which the recorder has (with certain exceptions) the same authority within the limits of the borough, as the county quarter sessions for the county at large.

(*n*) As to the borough courts of record, see 45 & 46 Vict. c. 50, ss. 165, 175; also 6 & 7 Will. 4, c. 105, s. 9; 7 Will. 4 & 1 Vict. c. 78, s. 31; 2 & 3 Vict. c. 27; 15 & 16 Vict. c. 76, s. 228; 17 & 18 Vict. c. 125, s. 105; 23 & 24 Vict. c. 126, s. 44; 35 & 36 Vict. c. 86.

(*o*) 45 & 46 Vict. c. 50, s. 161.

(*p*) Ibid. s. 156. And as to borough justices, see also 7 Will. 4 & 1 Vict. c. 78, ss. 30, 31; 12 & 13 Vict. cc. 8, 18, 64; 13 & 14 Vict. c. 91; 15 & 16 Vict. c. 38; 18 & 19 Vict. c. 126; 24 & 25 Vict. c. 75, s. 3; and as to their *clerk*, see The Queen *v.* Fox, 1 E. & E. 729, and 24 & 25 Vict. c. 75, s. 5; also, 51 & 52 Vict. c. 23.

(*q*) 45 & 46 Vict. c. 50, s. 155 (mayor); s. 163 (recorder); and 51 & 52 Vict. c. 23.

(*r*) R. *v.* Sainsbury, 4 T. R. 451.

justices have *concurrent* jurisdiction (*s*); and, of course, where the borough has *no* separate quarter sessions, the county justices have jurisdiction within the borough.

It is provided also, that the council shall not, except with the approval, formerly of the Lords of the Treasury, but now of the Local Government Board (*t*), sell or mortgage the lands or public stock of the borough, or demise such lands for more than a certain term (*u*): and that the rents, profits, and interest of all corporate property shall be paid to the treasurer, and carried to the account of the *borough fund* (*x*); which fund, after discharging debts (*y*), shall be applied to the payment of salaries, the expenses connected with the corporate elections, prosecutions, constabulary, prison accommodation, and other public purposes (*z*),—that the surplus (if any) shall be expended for the public benefit of the inhabitants (*a*), and the deficiency (if any) made up by a rate (*b*),—and that the accounts shall be at all times open to inspection, and regularly audited and printed for the use of the ratepayers (*c*); and shall be submitted to the Secretary of State, and be laid by him before both Houses of Parliament (*d*).

The Municipal Corporations Act, 1835, distinguished between the rights newly conferred by that Act, and the antecedent rights of the corporators, both with regard to the corporate property and as to their parliamentary franchise. For, as to the corporate property, it provided that every inhabitant, and every person admitted a freeman or burgess, and the wife, widow, son, or daughter of any freeman or burgess, and every person married to the daughter or widow of a freeman or burgess, and every apprentice,—

(*s*) 2 Arch. Just. 26.
(*t*) 51 & 52 Vict. c. 41, s. 72.
(*u*) Vide sup. vol. I. p. 444.
(*x*) 45 & 46 Vict. c. 50, s. 139.
(*y*) Ibid. ss. 112, 113.
(*z*) Ibid. s. 140, and 5th schedule to Act.
(*a*) Ibid. s. 115.
(*b*) Ibid. s. 144.
(*c*) Ibid. ss. 26, 27.
(*d*) Ibid. s. 28.

should respectively enjoy the same share and benefit of the lands and public stock of the borough, as he or she might have enjoyed in case the Act had not been passed: subject to this limitation, namely, that the total amount to be divided among such persons should not exceed the surplus which remained after payment of the expenses charged by the Act upon the borough fund (*e*). And as to the parliamentary franchise, the Act provided, that every person who would or might have had, as a burgess or freeman, the right of voting in the election of members of parliament if the Act had not passed, should continue entitled to that right (*f*); and for the purposes of such reserved rights, the Act required the town clerk of every borough to make out a list (to be called *the freemen's roll*) of all persons admitted burgesses or freemen (*g*),—as distinguished from the burgesses newly created by the Act, and who were to be entered on another roll, to be called the *burgess roll*. The Municipal Corporations Act, 1882, has enacted that the *freemen's* roll shall continue to be kept (*h*); and the property rights of such freemen are preserved (*i*); and also their parliamentary franchises (*k*).

The Municipal Corporation Act, 1835, introduced also other innovations upon the laws and customs which formerly prevailed in corporate towns. For while, before that Act, the title of burgess (or the freedom of the city, as it was called), was generally acquired by birth, marriage, or servitude (that is, by being born of a freeman, by marrying the daughter or widow of a freeman, or by apprenticeship for seven years within the borough to a freeman), or by gift or purchase,—the Act provided, that no person should in future be made a burgess or freeman by gift or purchase (*l*); and although by the Honorary Freedom of Boroughs Act, 1885 (48 & 49 Vict. c. 29),

(*e*) 5 & 6 Will. 4, c. 76, s. 2.
(*f*) Ibid. s. 4; 7 Will. 4 & 1 Vict. c. 78, s. 27.
(*g*) 5 & 6 Will. 4, c. 76, s. 5.
(*h*) 45 & 46 Vict. c. 50, s. 203.
(*i*) Ibid. ss. 205—208.
(*k*) Ibid. s. 209.
(*l*) 5 & 6 Will. 4, c. 76, s. 3.

the council may confer the freedom of the borough upon distinguished persons, yet this distinction is not to entitle such freemen to vote at any parliamentary or other election for the borough, or to participate in the corporate property of the borough. The Act of 1835 abolished also (though with a reservation of the rights of claimants living at the date of the statute) the exemptions that had theretofore been ordinarily claimed by burgesses, inhabitants, or the like, from such tolls or dues as were levied to the use of the body corporate (*m*). And whereas, before the Act, in divers boroughs, a custom had prevailed, and bye-laws had been made, that no person not being free of the borough, or of certain guilds, mysteries, or trading companies therein, should keep a shop for merchandise, or use certain trades or occupations for gain within the same,—the Act provided that every person might in future keep any shop in any borough, and use every lawful trade and occupation therein, any such custom or bye-laws notwithstanding (*n*). All which innovations (it need hardly be mentioned) are maintained by the Municipal Corporations Act, 1882.

The principle of self-government which (as we have seen) is at the root of the municipal corporation, has been recently extended from the borough to the county, by the Local Government Act, 1888 (51 & 52 Vict. c. 41); and by the same Act, and in order to work out more effectually the system which it seeks to establish, certain changes of a material character have been made with reference also to certain of the municipal corporations before treated of; and it is desirable to consider the provisions of this most important Act with some measure of detail.

Firstly, then, the Act establishes a council (called the county council) in every administrative county, and entrusts to such council the administrative and financial

(*m*) Ibid. s. 2; 6 & 7 Will. 4, c. 104, s. 9.

(*n*) 5 & 6 Will. 4, c. 76, s. 14.

business of that county (sect. 1); and it transfers to the county council all the administrative business of the justices of the county in quarter sessions assembled, in respect of all the various matters that are enumerated in the third section of the Act, and which are hereinafter more particularly referred to; and also the business of the justices of the county out of session in respect of the licensing of stage plays, and the execution of the provisions of the Explosives Act, 1875 (sect. 7); but not any judicial business of the quarter sessions, or of the justices of the county as regards rating appeals; or, in fact, any other judicial business (sects. 8, 78); and the county police are placed under the joint control of the quarter sessions and the county council, to be exercised through a standing joint committee of both (sect. 9).

Secondly, the county council is made elective; and the election is conducted, in general, as in the case of the election of the council of a borough divided into wards, but the divisions of the county are to be called electoral divisions and not wards (sect. 2); and the electors (in the case of boroughs returning one or more county councillors) are to be the burgesses thereof enrolled in pursuance of the Municipal Corporations Act, 1882, and (in the other parts of the administrative county) are to be the persons registered as county electors under the County Electors Act, 1888 (*o*), that is to say, the persons entitled in such places (*p*) to the burgess qualification enacted by sect. 9 of the Municipal Corporations Act, 1882 (*q*), the 10*l.* occupation qualification also entitling a party to be registered as a county elector, and to be enrolled as a burgess (*r*); and these elections are now, as to the date thereof and some few other particulars, regulated in part by the 54 & 55

(*o*) 51 & 52 Vict. c. 10; and see 52 & 53 Vict. c. 19.

(*p*) Ibid. s. 2.

(*q*) Supra, p. 34.

(*r*) 51 & 52 Vict. c. 10, s. 3.

Vict. c. 68, it being thereby provided that the day for these elections shall be the 8th day of March, or some day between the 1st and 8th day of March.

Thirdly, the county council consists of a chairman, aldermen, and councillors (*s*), the aldermen being called county aldermen, and the councillors being called county councillors. The council is a body corporate, by the name of the administrative county, with perpetual succession, a common seal, and power to hold lands without licence in mortmain (*t*); and the clerk of the peace for the county is made the clerk of the county council (*u*). The chairman is elected by the council, and the aldermen are elected by the councillors, the election of aldermen being conducted in like manner as the like election under the Municipal Corporations Act, 1882 (*x*), and a councillor may be elected an alderman,—the county councillors being elected for a term of three years, when they retire, and a new election takes place (*y*), the 16th day of March in lieu of the 8th day of November, being the day which, by the 54 & 55 Vict. c. 68, is now appointed for these elections.

Fourthly, the Act constitutes each of certain boroughs an administrative county of itself, these being the boroughs named in the third schedule to the Act, and each of which, on the 1st June, 1888, either had a population of not less than 50,000, or was a county of itself; and all such boroughs are to be distinguished as "county boroughs" (*z*).

Fifthly, the Act constitutes the Metropolis an administrative county by the name of "the administrative county of London" (*a*); and, for all non-administrative purposes, constitutes also a "county of London," consisting of those

(*s*) Clerks in holy orders and other ministers of religion are eligible either as aldermen or as councillors; also, peers qualified by owning property in the county; also, all persons registered as parliamentary voters, in respect of the ownership of property within the county. (Sect. 2.)

(*t*) 51 & 52 Vict. c. 41, s. 79.

(*u*) Ibid. s. 83.

(*x*) Ibid. s. 75.

(*y*) Ibid. s. 2.

(*z*) Ibid. s. 31.

(*a*) Ibid. s. 40.

parts of the counties of Middlesex, Surrey, and Kent, which fall within the area of the administrative county of London; but the county of the city of London, for all non-administrative purposes, continues a separate county (*b*). The county councillors for the administrative county of London are double the number of members of parliament returned for the Metropolis, each borough, or division of a borough, being made an electoral division of the administrative county; but the number of county aldermen is not to exceed one-sixth of the whole number of county councillors (*c*). All the powers, duties, and liabilities of the Metropolitan Board of Works are transferred to the county council of the administrative county of London (*d*); and among these the powers of borrowing (*e*); and these powers have been since largely increased, but only for the due execution of the onerous duties entrusted to this council (*f*).

The financial and administrative business of the county council extends to and includes (*g*) (among other less important matters) the making, assessing, and levying of county rates, police rates, and rates generally, and the application and expenditure of the money received on account of such rates; the borrowing of money and the

(*b*) 51 & 52 Vict. c. 41, s. 40.

(*c*) As to the three ridings of Yorkshire, the three divisions of Lincolnshire, the two divisions of Sussex, the two divisions of Suffolk, the two divisions of the county of Cambridge, and the two divisions of the county of Northampton, see sect. 46, each riding or division being made a separate administrative county.

(*d*) 51 & 52 Vict. c. 41, s. 40.

(*e*) See the Metropolitan Board of Works (Loans) Acts, 1869 to 1871 (32 & 33 Vict. c. 102; 33 & 34 Vict. c. 24; and 34 & 35 Vict. c. 47); and the Metropolitan Board of Works (Money) Acts, 1875 to 1888 (38 & 39 Vict. c. 65; 39 & 40 Vict. c. 55; 40 & 41 Vict. c. 52; 41 & 42 Vict. c. 37; 42 & 43 Vict. c. 69; 43 & 44 Vict. c. 25; 44 & 45 Vict. c. 48; 45 & 46 Vict. c. 33; 46 & 47 Vict. c. 27; 47 & 48 Vict. c. 50; 48 & 49 Vict. c. 50; 49 & 50 Vict. c. 44; 50 & 51 Vict. c. 31; 51 & 52 Vict. c. 40; 52 & 53 Vict. c. 61).

(*f*) 52 & 53 Vict. c. 61; 53 & 54 Vict. c. 41; 54 & 55 Vict. c. 62.

(*g*) 51 & 52 Vict. c. 41, s. 3.

passing of the accounts of the county treasurer; the provision, enlargement, maintenance, management, and visitation of pauper lunatic asylums, and of reformatory and industrial schools; the payment of compensation, payable formerly by the hundred or by the inhabitants of a county, and now payable by the county council (*h*) under the Riot (Damages) Act, 1886; the registration of the rules of scientific societies; the registration of charitable gifts, the certifying of places of religious worship, and the confirming of the rules of loan societies; also, the maintenance of the assize courts, lock-up houses, police-stations, and county buildings generally; the maintenance of bridges and of roads repairable with bridges (and of main roads) (*i*); the enforcement of the Contagious Diseases (Animals) Acts, and of the Acts relating to destructive insects, and to the protection of fish and of wild birds, and to the prevention of river pollution; the supervision of weights and measures, and of gas-meters; the conduct of parliamentary elections (including the registration of voters and the revision of the lists of voters); the appointment and payment of medical officers (*k*), and of public inspectors and analysts, and the like; and of the county treasurer and county surveyor; and of the coroner for the county (*l*), and of district coroners; also, all business formerly done by the justices of the county in quarter sessions in respect of music and dancing licences and race-course licences (*m*), or done by the justices out of sessions in respect of the licensing of houses or places for the public performance of stage plays, or in respect of the execution, as local authority, of the Explosives Act, 1875. But as regards the maintenance of main roads, the urban authority of the district may retain the duty of maintaining and repairing same (*n*) as ordinary roads, receiving in that case from the county council

(*h*) 51 & 52 Vict. c. 41, s. 79.
(*i*) Ibid. s. 11.
(*k*) Ibid. s. 17.
(*l*) Ibid. s. 5.
(*m*) Ibid. s. 3.
(*n*) Ibid. s. 11.

an annual contribution towards the costs of such maintenance and repair (*o*); and the county council may also contribute to the cost of any highway or public footpath in their county although the same should not be a main road. Every county council may also make bye-laws within their county, relating to all or any of the matters aforesaid, in like manner as the council of a borough may make bye-laws, in relation to their borough, under the Municipal Corporations Act, 1882; but the bye-laws of a county council are to be inoperative in any borough (*p*).

The Local Government Act, 1888, also provides for the establishment of a local taxation account for each administrative county, into which account are to be paid the proceeds of the duties collected within the county by the Inland Revenue Commissioners on the local taxation licences specified in the first schedule to the Act (*q*), being wine and spirit licences, ale and beer and tobacco licences, game licences, carriage taxes, and the like; and the amount so paid into such account, is to be paid out to the county council for the uses of the county, being in lieu of the grants from the Imperial Exchequer theretofore usual in aid of local taxation; and such payments to the county council are placed to the exchequer contribution account of the council (*r*). The Act also provides for payment to the like account, and for the like uses, of four fifth parts of one equal half part of the probate duties collected each year within the county (*s*), (or now the equivalent amount of the estate duty) (*t*), such latter grant being also in lieu of the imperial grants theretofore made in aid of local taxation; and there are elaborate provisions contained in the Act providing for the distribution and application of such local taxation and probate duty grants respectively; *e.g.*, the

(*o*) 51 & 52 Vict. c. 41, s. 11; and as to roads in the Isle of Wight, see 51 & 52 Vict. c. 41, s. 12; and as to roads in South Wales, sect. 13.

(*p*) Ibid. s. 16.

(*q*) Ibid. s. 20.

(*r*) Ibid. s. 23.

(*s*) Ibid. ss. 21, 22, 24.

(*t*) 57 & 58 Vict. c. 30, s. 19.

county council shall pay, out of the Exchequer Contribution Account, to the guardians of poor law unions a certain amount (to be certified by the Local Government Board) towards the remuneration of teachers in poor law schools and of public vaccinators, and also the school fees paid for pauper children sent from workhouses to public elementary schools; and shall pay to the local authority one half the salary of the medical officer and nuisance inspector of such authority; and they are to pay a certain amount to the registrars of births and deaths, and four shillings a week for the maintenance of every pauper lunatic chargeable to the county, or to any poor law union wholly or partly within the county, or to any borough within the county; and they are to transfer to the police account of the county one half of the cost of the pay and clothing of the county police, and they are to pay to the council of every borough maintaining a separate police force under the County and Borough Police Acts one half of the cost of the pay and clothing of such police force; besides making certain other payments. And by the 53 & 54 Vict. c. 60, the local taxation (customs and excise) duties, which by sect. 7 of the 53 & 54 Vict. c. 8, have been assigned to county councils by way of augmentation of this probate duty grant have been similarly appropriated, subject to a first charge thereon for police superannuation.

And the Local Government Act, 1888, provides,—for the purposes of the police, and the clerk of the peace, and the clerks of the justices (*u*), and joint officers, and of matters requiring to be determined jointly by the quarter sessions and the council of a county,—that there shall be a standing joint committee of the quarter sessions and the county council (*x*), consisting of such equal number of justices appointed by the quarter sessions, and of members of the county council appointed by that council, as may

(*u*) These officers are not appointed by the county council (sect. 3), but by the standing joint committee (sect. 83).

(*x*) 51 & 52 Vict. c. 41, s. 30.

from time to time be arranged between the quarter sessions and the council; and in default of arrangement, such number, taken equally from the quarter sessions and the council, as may be directed by a secretary of state; and it is provided, that any dispute arising under the Act with respect to the police, or to the clerk of the peace, or to clerks of the justices, or to officers who serve both the quarter sessions or justices and the county council, or to the provision of accommodation for the quarter sessions, or justices out of session, or to the use by them or the police or by the said clerks of any buildings, rooms or premises, or to the application of the Local Stamp Act, 1869 (*y*), to any sums received by clerks to justices, or with respect to anything incidental to the above-mentioned matters, and any other matter requiring to be determined jointly by the quarter sessions and the county council, shall be referred to and determined by the joint committee; and all such expenditure as the said joint committee determine to be required for the purposes of the matters above mentioned, are to be paid out of the county fund, and the county council is to provide for such payment accordingly.

The county council succeeds to all the property and also to all the liabilities of the county, and acquires full powers of management, and also full power (with the sanction of the Local Government Board) to alienate the county property (*z*); and is enabled to acquire lands as fully as any urban authority under the Public Health Act, 1875 (*a*); and all moneys received by the county council are to be carried to the county fund, and all payments for general county purposes, or for special county purposes, are to be paid in the first instance out of the county fund,—general county purposes being purposes affecting the administrative county generally, and special county purposes being

(*y*) This Act is the 32 & 33 Vict. c. 49, and provides for the collection, by means of stamps, of fines (or penalties) and fees leviable by the county justices or by the borough justices.

(*z*) 51 & 52 Vict. c. 41, s. 64.

(*a*) Ibid. s. 65.

purposes affecting a part or parts only of such county (*b*). The county council may also (with the sanction of the Local Government Board) borrow money on the security of the county revenues (*c*), up to the extreme limit of one-tenth of the rateable value of the rateable property within the county; and not beyond that limit, except under the authority of a provisional order of the Local Government Board, confirmed by Act of Parliament; and such loans may be contracted for any of the purposes for which quarter sessions are authorized to borrow, and for the discharge of old loans, and for many other purposes specified in the Act (*d*); and the county council may raise any such moneys, either as one loan or as several loans, and either by stock issued under the Act, or by debentures or annuity certificates under the Local Loans Act, 1875, or by mortgage (in special cases) under the provisions of the Public Health Act, 1875 (*e*); and generally, county stock may be created and issued, transferred, dealt with, and redeemed, as provided by the regulations in that behalf made by the Local Government Act (*f*). The receipts and expenditure of every county council are to be annually audited by district auditors appointed by the Local Government Board (*g*), up to the end of each financial year, *i. e.*, for the twelve months ending the 31st March in each year; and at the beginning of each financial year, the county council is to estimate the amount required for the first six months and for the second six months of the then next financial year (*h*); and is to appoint a finance committee for regulating and controlling the finances of the county; and a resolution of the council, on the recommendation of such committee, is necessary to any order of the council for payment of any sum out of the county fund (*i*); and all payments to or out of

(*b*) 51 & 52 Vict. c. 41, s. 68.
(*c*) Ibid. s. 69.
(*d*) Ibid.
(*e*) Ibid.
(*f*) Ibid. s. 70.
(*g*) Ibid. s. 71.
(*h*) Ibid. s. 74.
(*i*) Ibid. s. 80.

the county fund are to be made through the county treasurer.

Where the administrative county is a county borough, the council of the county borough has in general all the like powers and is under all the like duties and liabilities as the county council, and is entitled to participate in the proceeds of the duties carried to the local taxation account, and in the probate duty grant for the county in which the county borough is (or is to be deemed as being) situate; and the council of the county borough is to make the like payments thereout as are to be made by the county council (*k*); and all necessary equitable adjustments between the county council and the council of the county borough are to be made (*l*). The bridges within the borough repairable by the county, and the main roads within the borough, are made repairable by the county borough; and the council of the county borough may appoint the coroner where the district of the county coroner is wholly situate within the county borough (*m*).

Where a borough is a quarter sessions borough, and has a population of 10,000 and upwards, according to the census of 1881, but is not made a county borough by the Act, it falls indeed within the administrative county in which it is situate, but the powers, duties, and liabilities of the council of the borough under the Municipal Corporations Act, 1882, remain with the council of the borough, and do not pass to the county council (*n*). Nevertheless, the parishes within the borough are made liable to contribute, as a general rule, to the costs of all general county purposes, but with certain exemptions (*o*). Also, the county council succeeds to the powers, duties and liabilities of an administrative character which were theretofore vested in the court of quarter sessions or

(*k*) 51 & 52 Vict. c. 41, ss. 32, 34.
(*l*) Ibid. s. 32.
(*m*) Ibid. s. 34.
(*n*) Ibid. s. 35.
(*o*) Ibid.

justices of any borough, which is not made a county borough (*p*).

Besides the provisions above set forth, the Act contains many provisions on particular matters, which will be found referred to in connection therewith when such matters are touched upon in these Commentaries; and it contains also very complete provisions of a transitory character, intended to bring the Act into operation, but which it is unnecessary to consider.

By subsequent Acts, county councils are authorized to contribute, out of the county fund and as portion of their general expenses, to the funds of the association of county councils,—an association formed for the purpose of consultation as to various matters of local government (*q*); also, to concur with the councils of adjoining counties, in relation to the construction and maintenance, and to the alteration, of main roads and highways, and of bridges, including the approaches thereto (*r*); and to contribute to the expenses of enquiries before the charity commissioners touching any charity in which their county is interested (*s*); and to buy up manorial franchises relative to weights and measures (*t*); besides the numerous other matters, of a greater or less importance, entrusted to these councils and to the parish councils shortly to be mentioned, relative to allotments and small holdings (*u*), and to the protection of public rights (*x*), and the like; and they may also cause barbed-wire fencing along highways to be removed, when likely to be a nuisance to man or beast (*y*).

The principle of local self-government, first introduced by the Municipal Corporation Acts, and afterwards largely extended (as we have just seen) by the Local Government

(*p*) 51 & 52 Vict. c. 41, ss. 36—39.
(*q*) 53 & 54 Vict. c. 3.
(*r*) 54 & 55 Vict. c. 63.
(*s*) 55 & 56 Vict. c. 15.
(*t*) Ibid. c. 18.
(*u*) 53 & 54 Vict. c. 65; 55 & 56 Vict. c. 31; 56 & 57 Vict. c. 73.
(*x*) 56 & 57 Vict. c. 73.
(*y*) Ibid. c. 32.

Act, 1888, has recently received a still more considerable extension. For by the Local Government Act, 1894 (56 & 57 Vict. c. 73), for every rural parish throughout England and Wales containing a population of 300 or upwards, a parish council has been appointed, such council being elected by the parochial electors on the register (*z*); and provision is made for creating also a like council (to be similarly elected) for every rural parish having a less population than 300; and every rural parish is created a parish meeting (sect. 1). Every such parish council (sect. 3) is constituted a body corporate, by the name of the parish council of the parish; and when there is (and while there is) no parish council, but only a parish meeting, for any rural parish, the chairman of such meeting and the overseers of such parish (sect. 19), are constituted a body corporate, by the name of the chairman and overseers of the parish; and each of such corporate bodies (council or meeting) is to have all the incidents of a corporation, and with power to hold lands without a licence in mortmain. Also, where a rural parish is situate partly within, and partly without, a rural sanitary district, each part of such parish is, for the purposes of the Act, made a parish of itself, as if it had been so constituted under the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61); and for the purposes of the Act, parishes may be divided into wards (sect. 18), with councillors separately elected for each ward.

To the parish councils and parish meetings so constituted, in rural parishes, are entrusted (among many other details) the following powers and duties (sects. 5, 6), that is to say:—(1) The power and duty of appointing overseers of the poor, and the power of appointing (and of revoking the appointment of) an assistant overseer: (2) The powers,

(*z*) By sect. 44, this register is the local government register of electors and the parliamentary register of electors, so far as they relate to the parish or (as the case may be) to the parish ward.

duties, and liabilities of the vestry of the parish (except so far as relates to the affairs of the church, or to ecclesiastical charities); (3) The powers, duties, and liabilities of the churchwardens of the parish (except as aforesaid), including their duties with respect to maintaining and repairing closed churchyards wherever the expenses of such maintenance and repair are, under the Burial Act, 1855, repayable out of the poor rate; (4) The powers, duties, and liabilities of the overseers, or of the churchwardens and overseers, of the parish, relative to valuation lists (appeals and objections therefrom or thereto), or relative generally to the poor rate, or to the county rate, or to the basis of the county rate; and relative to the provision of parish books, and of a parochial office, or vestry room, and of a parish chest; and relative to a fire engine or fire escape; and relative to the holding or management of the parish property (other than property belonging to the church, or held for any ecclesiastical charity); and relative to the holding or management of village greens, and of allotments, whether for recreation grounds, or for gardens, or otherwise for the benefit of the inhabitants, or any of them; and (5) The powers exercisable, with the approval of the Local Government Board, by the board of guardians for the poor law union comprising the parish, in respect of the sale, exchange, or letting of any parish property.

And in addition to the powers above referred to, the parish council, or parish meeting, may also make the complaints, as to unhealthy dwellings for artisans, appointed by the 53 & 54 Vict. c. 20; and the representations required to be made by the 50 & 51 Vict. c. 48 and 53 & 54 Vict. c. 65, with regard to allotments; and two members of the parish council, or (as the case may be) parish meeting, are constituted (in effect) allotment wardens or managers under the Small Holdings Act, 1892 (55 & 56 Vict. c. 31); and the parish meeting has the exclusive power (in rural parishes) of adopting such Acts as the Baths and Washhouses Acts, 1846 to 1882, and the Public Libraries Act, 1892,

and other like Acts, called by way of distinction "Adoptive Acts," tending to secure the physical and moral health and recreation of the people. And the parish meeting may also (sect. 8) exercise (either alone or concurrently with other adjoining parishes) the specific powers following, that is to say:—power to provide suitable offices, and to provide or acquire land for that purpose; power to provide, or acquire land for, a recreation ground, or for public walks; power to intervene, by application to the Board of Agriculture and otherwise, in the protection of common rights, and for the regulation of commons, and generally to exercise, with respect to any recreation ground, village green, open space, or public walk, which is for the time being under their control, or to the expense of which they have contributed, all the powers exercisable by an urban authority under the Public Health Acts; also, power to utilise any spring, well, or stream within their parish, and to provide facilities for obtaining water therefrom, but so as not to interfere with the rights of any corporation or person, together with power to deal with any pond, pool, open ditch, drain, or place containing, or used for the collection of, any drainage, filth, stagnant water, or matter likely to be prejudicial to health, but so as not to interfere with any private right, or the sewage or drainage works of any local authority; also, power to acquire by agreement any right of way, whether within their parish or an adjoining parish, the acquisition of which is beneficial to the inhabitants of the parish or any part thereof; and to accept and hold any gifts of property, real or personal, for the benefit of the inhabitants of the parish or any part thereof; also, power generally to execute any works in relation to any parish property (other than property belonging to the church, or held for an ecclesiastical charity); and when the parish council is unable, by agreement, to procure suitable land for its necessary purposes or for allotments, it is to bring the matter under the notice of the county council within whose district the rural parish is situated; and the

latter council may proceed to enable the parish council to acquire the requisite land compulsorily, that is to say, under the provisions in that behalf of the Lands Clauses Consolidation Act, 1845, and the Public Health Act, 1875.

Also, for any of the following purposes (sect. 12), that is to say, (1) for the purchase of any land, or for the building of any buildings, which the parish council may lawfully purchase or build; (2) for any purpose authorized by such of the adoptive Acts above referred to as the parish council may have adopted; and (3) for any permanent work or other thing which the parish council may lawfully execute or do,—the parish council may, with the consent of the county council and of the Local Government Board, borrow money in like manner and subject to the like conditions as a local authority may borrow under the provisions of the Public Health Act, 1875, the loan being secured on the poor rate and on other the revenues of the parish council, and the power to borrow being limited to one-half of the assessable value for two years of the premises assessable within the parish.

The Act also provides (sect. 21), that urban sanitary authorities shall be called urban district councils (municipal corporations continuing their style or title unaltered), and that the district of each such urban authority shall be called an urban district; and that there shall be a rural district council for every rural sanitary district, and that its district shall be called a rural district,—the term district council comprising each class of district council (whether urban or rural), and the term county district comprising every urban and also every rural district. And (by sect. 25) there are transferred to every rural district council all the powers, duties, and liabilities, as well of the rural sanitary authority in the district as also of the highway authority in the district,—a rural district council being, in this latter particular, placed on the same footing as an urban district council,—and (by sect. 26) every district council is charged with the protection of public rights

of way, public rights of common, and public rights over road-side wastes; and (by sect. 27) is charged with the licensing of gang-masters, dealers in game, passage brokers, emigrant runners, and the like. And the Act contains also the due provisions for meeting the expenses of the parish council (or parish meeting) and of the district council; and provisions for gradually securing a uniformity of administration, the county council within every county district bringing (as nearly as can be) every parish within its district under one district council (sect. 36), and taking the due proceedings for such grouping or separating of parishes as shall be judged expedient (sect. 38), and for such dissolution of parish councils and creation of new parish councils as the decrease or increase of the population may render desirable (sect. 39). And, we may here observe, that the county council is charged to bring the Act into operation, or to see that it is brought into operation; and thereafter that council is charged generally, subject to an appeal to the High Court, with the supervision of the working of the Act.

CHAPTER II.

OF THE LAWS RELATING TO THE POOR.

[By the common law, as appears by the Mirrour (*a*), the poor were to be "sustained by parsons (rectors of the "church) and the parishioners, so that none of them "should die for default of sustenance;" but no compulsory method for their relief or sustenance was provided until the reign of Hen. VIII. The monasteries, as possessors of the bulk of the tithes, appear to have been the principal almoners; and they undoubtedly supported a very numerous and idle poor, by a daily distribution of alms at their gates; and accordingly, upon the dissolution of the monasteries, abundance of statutes were made, in the reigns of King Henry the eighth and his children, for providing for the poor and impotent, which, the preambles recite, had of late years greatly increased.

These poor were principally of two sorts: Firstly, the sick and impotent, and who were therefore unable to work; and, Secondly, the idle and sturdy, and who, although able, were not willing to work. To provide, in some measure, for both of these, in and about the metropolis, Edward the sixth founded three royal hospitals: Christ's and St. Thomas's, for the relief of the impotent; and Bridewell, for the punishment and employment of the vigorous and idle. And ultimately, after many other experiments, which were more or less effective, by the

(*a*) Ch. 1, sect. 3.

[statute 43 Eliz. c. 2, (which is generally considered as the foundation of the modern poor law,) *overseers* of the poor were appointed in every parish;] and it was provided, that the churchwardens of every parish should be the overseers; and that there should likewise be appointed as overseers two, three, or four, but not more, of the inhabitants, being substantial householders, to be nominated yearly by two justices dwelling in or near the parish.

This Act of Elizabeth involved two principles; first, that every poor person should be either relieved, or provided with work; and secondly, that this should be done *parochially*, that is, out of funds to be raised and applied by parish officers within the limits of their respective parishes. It is to be understood, however, that it was not the policy of the law, to allow paupers to resort for *relief* indiscriminately to any parish they might prefer: for, by certain statutes of a date anterior to the above Act, persons unable or unwilling to work were compellable to remain in the particular parishes where they were *settled* (*b*), that is, where they were born, or had made their abode for three years, or (in the case of vagabonds) for one year only (*c*). Still there was no regulation, either prior to the Act of Elizabeth, or for a long period afterwards, to prevent an able-bodied and industrious pauper from resorting to any parish that he pleased for *employment*. However, soon after the Restoration, the more restrictive principle was introduced, of confining, to his existing place of *settlement*, every person whose circumstances were such as to make it probable that he would become a charge upon the parish; and accordingly, by the statute 14 Car. II. c. 12, s. 1, it was (in substance) provided, that persons newly coming to settle in any parish, and likely to become chargeable, might be *removed* by the warrant of two justices of the peace, on complaint of the parochial officers, to the parish where they were last legally

(*b*) 19 Hen. 7, c. 12; 1 Edw. 6, c. 3; 3 & 4 Edw. 6, c. 16; 14 Eliz. c. 5.
(*c*) 1 Bl. Com. 361.

settled (*d*),—the same Act also abridging the period at which a man acquired a *settlement* by residence, to forty days (*e*). But inasmuch as the Act subjected the poor to removal from every place in which they were not settled to the place where they were settled, it had the indirect effect of attaching to a settlement the quality of a *right*, to wit, an exemption from removal; and persons, who (for any reason) were desirous of gaining a settlement-right in particular parishes, were found to resort to them furtively, with the view of completing their forty days' residence therein before they were discovered (*f*). To prevent which, provision was afterwards made, that the forty days should be computed, only from the period when notice in writing of the new comer's abode was given to the parish officers, such notice being dispensed with only in cases where the residence was attended with certain circumstances of notoriety, such as entering into a yearly service, or an apprenticeship (*g*); and although at a subsequent period the requisite of notice was abandoned (*h*), the requisite of notoriety remained. Other consequences in the meantime flowed from the principle, that a settlement was in the nature of a right: for it became established, that (like other rights) this right might be claimed *derivatively;* that is, that the child was entitled to the parent's settlement, and the wife to that of her husband (*i*). And to complete this historical outline, it only remains to be mentioned, that, in the reign of George the third (*k*), a man coming to settle in a parish ceased to be liable to removal, upon the mere *probability* of becoming chargeable, and must have become actually chargeable, by receiving or applying for relief, in order to

(*d*) R. *v.* St. James, 10 East, 31.

(*e*) 1 Bl. Com. 362; 1 Jac. 2, c. 17, s. 3.

(*f*) Bl. Com. ubi sup.

(*g*) Ib.; 3 W. & M. c. 11.

(*h*) 35 Geo. 3, c. 101, s. 3.

(*i*) Fort. 313; 1 Nol. 274.

(*k*) 35 Geo. 3, c. 101, s. 1; and see the prior statutes 8 & 9 Will. 3, c. 30; 9 Will. 3, c. 11; 12 Ann. c. 18, s. 2; 3 Geo. 2, c. 29, ss. 8, 9.

become removeable; and it not unfrequently happened, that, in the meantime, he had acquired the status of irremovability.

In modern times, owing to the gradual increase of population and of paupers, various measures were from time to time devised by the legislature, for the improvement of the poor law system, and particularly for the improvement of the administration of poor law *relief*. Thus, by the statute 22 Geo. III. c. 83,—commonly called Gilbert's Act (*l*),—any parish was authorized, (by consent of two third parts in number and value of the owners or occupiers, and with the approbation of two justices,) to appoint *guardians* to act in lieu of overseers, in all matters relative to the relief and management of the poor; and also to enter into a voluntary union with one or more other parishes, for the more convenient accommodation, maintenance, and employment of their paupers in common. Also, by the 59 Geo. III. c. 12, commonly called "The Select Vestry Act," any parish, in vestry assembled, was enabled to commit the management of its poor to a committee of the parishioners called a *select vestry;* to whose orders the overseers should conform. But these measures, though beneficial, were not sufficiently effective; nor were they generally adopted; and in the meantime, the evils resulting from the mismanagement of the poor continued to increase; and these evils were aggravated by the injudicious administration of the poor laws, proceeding upon certain inherent defects in the then existing poor law system,—the duty of executing the poor law being, *e.g.*, left, in the case of each parish, to that parish individually; whence resulted a great absence of uniformity in the different parishes in their poor law administration. Moreover, the size of most parishes was so limited as to expose them to great disadvantages, both with regard to the employment

(*l*) Henderson *v.* Sherborne, 2 M. & W. 239; In re Whitechapel Union, 6 Ad. & E. 49.

and to the relief of their poor,—the difficulty and expense of which are both obviously reduced, when the field of operation is wider and provision can be made on a larger scale. All which considerations induced parliament, in the year 1833, to issue a royal commission, to inquire into and report on the laws relating to the poor; and in the following year, and upon the basis of the report of the commissioners, was passed the statute 4 & 5 Will. IV. c. 76, known as "The Poor Law Amendment Act, 1834," and which, as supplemented by the divers statutes specified below (*m*), and latterly by the Local Government Acts, 1888 and 1894 (51 & 52 Vict. c. 41 and 56 & 57 Vict. c. 73), is the foundation of the existing poor law system.

(*m*) 5 & 6 Will. 4, c. 69 (The Union and Parish Property Act, 1835); 2 & 3 Vict. c. 84; 5 & 6 Vict. c. 18 (Parish Property and Parish Debts Act, 1842); 5 & 6 Vict. c. 57; 7 & 8 Vict. c. 101; 8 & 9 Vict. c. 117; 9 & 10 Vict. c. 66 (Poor Removal Act, 1846); 10 & 11 Vict. c. 109 (Poor Law Board Act, 1847); 11 & 12 Vict. c. 31 (Poor Law Procedure Act, 1848); c. 82; c. 91 (Audit Act, 1848); c. 110; c. 111; 12 & 13 Vict. c. 13; c. 103; 13 & 14 Vict. c. 101; 14 & 15 Vict. c. 105; 20 Vict. c. 19; 22 & 23 Vict. c. 49; 24 & 25 Vict. c. 55; c. 76; 25 & 26 Vict. c. 113; 26 & 27 Vict. c. 89; 28 & 29 Vict. c. 79 (The Union Chargeability Act, 1865); 29 & 30 Vict. c. 113; 30 & 31 Vict. c. 6 (The Metropolitan Poor Act, 1867, amended by 34 Vict. c. 15); c. 106; 31 & 32 Vict. c. 122; 32 & 33 Vict. c. 41 (The Poor Rate Assessment Collection Act, 1869, amended by 42 & 43 Vict. c. 10, The Assessed Rates Act, 1879); c. 45 (The Union Loans Act, 1869, amended by 42 & 43 Vict. c. 54, s. 13); c. 63 (The Metropolitan Poor Amendment Act, 1869); 33 & 34 Vict. c. 2 (The Dissolved Boards of Management and Guardians Act, 1870); c. 18 (The Metropolitan Poor Amendment Act, 1870); c. 48 (The Paupers Conveyance Expenses Act, 1870); 34 & 35 Vict. c. 11 (The Poor Law Loans Act, 1871); c. 70 (The Local Government Board Act, 1871); c. 108 (The Pauper Inmates Discharge and Regulation Act, 1871); 35 & 36 Vict. c. 2 (The Poor Law Loans Act, 1872); 39 & 40 Vict. c. 61 (The Divided Parishes and Poor Law Amendment Act, 1876, amended by 42 & 43 Vict. c. 12); 42 & 43 Vict c. 6 (The District Auditors Act, 1879); c. 54 (The Poor Law Act, 1879); 45 & 46 Vict. c. 20 (The Poor Rate Assessment Act, 1882); c. 58 (The Divided Parishes and Poor Law Amendment Act, 1882); c. 80; 46 & 47 Vict. c. 11 (The Poor Law Conferences Act, 1883); and 48 & 49 Vict. c. 22 (The Public Health and Local Government Conferences Act, 1885).

By the statute 4 & 5 Will. IV. c. 76, the general management of the poor, and of the funds for their relief, throughout the country, was placed for a limited period under the superintendence and control of "The Poor Law Commissioners"; who had power to make such regulations as they thought proper for the guidance of the different parochial authorities, and who were aided in their operations by a certain number of assistant commissioners. This commission was superseded in the year 1847; and in lieu thereof, a board was established, by 10 & 11 Vict. c. 109, known as the "Poor Law Board;" to which Board, all the powers and duties of the former poor law commissioners were then transferred (*n*). Subsequently, all these powers and duties were assigned to, and are now vested in, the "Local Government Board," (established in the year 1871 by 34 & 35 Vict. c. 70,) which consists of a president appointed by her Majesty, holding office during pleasure, together with (as *ex officio* members) the lord president of the privy council, all the secretaries of state, the lord privy seal, and the chancellor of the exchequer; and all *general poor law rules*—a term which extends to all rules intended to affect more than one union (*o*)—must be under the seal of this Board, and under the hands of a quorum of whom the president must be one (*p*); and any such rules may be disallowed by her Majesty in council (*q*), or their validity may be questioned in the Queen's Bench division (*r*); and once in every year, the Board submits to parliament a general report of its proceedings (*s*).

The Board was empowered (when such a course seemed proper) to direct, that the relief of the poor in any parish

(*n*) 10 & 11 Vict. c. 109, s. 10; 30 & 31 Vict. c. 106.

(*o*) 10 & 11 Vict. c. 109, s. 15.

(*p*) Only the *president* and *one* of the secretaries may sit in the House of Commons at the same time. (10 & 11 Vict. c. 109, ss. 8, 9; 34 & 35 Vict. c. 70, s. 4.)

(*q*) 10 & 11 Vict. c. 109, s. 17.

(*r*) 11 & 12 Vict. c. 110, s. 4; 12 & 13 Vict. c. 103, s. 13; Westbury-on-Severn Union case, 4 Ell. & Bl. 314.

(*s*) 10 & 11 Vict. c. 109, s. 13.

should be administered by a board of guardians, to be elected by the owners of property and ratepayers in that parish, in such manner as in the Poor Law Acts set forth (*t*); and poor law inspectors were appointed for the purpose of visiting workhouses, and of being present at meetings of guardians, or other local meetings held for the relief of the poor (*u*); and the superintendence of the board was extended to poor persons lodged and maintained by contract, in any establishment, not being a lunatic asylum or workhouse nor under the effective control of any parochial or other local authority (*x*). Moreover, no parishes were for the future to be united, under Gilbert's Act, without the previous consent of the Board; and the Board might also at its discretion consolidate two or more parishes into one *union*, under the government of a single board of guardians, to be elected by the owners and ratepayers of the component parishes (*y*), the county justices resident in the union or parish becoming *ex officio* guardians (*z*). And each of such "unions" was to have a common workhouse, provided and maintained at the common expense of the component parishes; and also a *common fund*, to which each component parish was to contribute (*a*); and on this fund (by 28 & 29 Vict. c. 79, s. 1) was charged all the cost of the relief of the union poor, as well as certain other expenses incurred by the union board of guardians (*b*). Also, by the 42 & 43 Vict. c. 54, s. 8, provision was made for the combination of

(*t*) 4 & 5 Will. 4, c. 76, ss. 39, 40; Robinson *v.* Todmorden Union, 3 Q. B. 675; 7 & 8 Vict. c. 101, ss. 14—21; 14 & 15 Vict. c. 105, ss. 2, 3; 30 & 31 Vict. c. 106, ss. 4—10.

(*u*) 10 & 11 Vict. c. 109, ss. 18, 20.

(*x*) 12 & 13 Vict. c. 13.

(*y*) 4 & 5 Will. 4, c. 76, s. 38.

(*z*) 7 & 8 Vict. c. 101, s. 24.

(*a*) 24 & 25 Vict. c. 55, ss. 9—11; 28 & 29 Vict. c. 79, s. 12; 30 & 31 Vict. c. 106, s. 15.

(*b*) The other expenses referred to comprised the relief of destitute wayfarers (11 & 12 Vict. c. 110, ss. 1, 10; 12 & 13 Vict. c. 103, s. 2; 24 & 25 Vict. c. 55, s. 4); the burial of workhouse paupers (13 & 14 Vict. c. 101; 28 & 29 Vict. c. 79, s. 1); the relief of persons temporarily disabled by accident or sickness (24 & 25 Vict. c. 16, s. 5); the costs of pauper lunatics (ibid. s. 6), and vaccination and registration expenses (28 & 29 Vict. c. 79, s. 1).

unions in certain cases (*c*). As regards the relief of the destitute poor *in the metropolis*, the cost thereof was distributed among the several unions, parishes, and places therein, under the superintendence of the Local Government Board (*d*). The provisions above summarized are (roughly speaking) the provisions now in force, with only such variations as have been introduced therein by the Local Government Acts, 1884 and 1894, of which some notice was taken in the preceding chapter, and which, so far as they relate to the poor law, will be specifically mentioned at the end of this present chapter.

The poor law system, as at present established, will be most conveniently dealt with, if we consider it, firstly, in connection with the settlement of the poor; and secondly, in connection with the administration of poor law relief, and the assessment and collection of the poor rate.

And firstly, as regards poor law settlements:—A settlement may be acquired by birth, or by parentage, or by marriage, or by renting a tenement, or by being bound apprentice and inhabiting, or by estate, or by payment of taxes, or by residence. (1.) By *birth*,—for wherever a child is first known to be, that is always *primâ facie*, and until some other can be shown, the place of its settlement (*e*); but if its parents can be proved to have acquired a settlement, either by birth or otherwise, in another parish, then the *primâ facie* settlement of the child will be superseded by a derivative one, viz., the settlement by parentage, of which we are about to speak next (*f*). (2.) By

(*c*) On one occasion of great distress in the counties of Lancaster, Chester, and Derby, the poor law authorities were, by a temporary Act (25 & 26 Vict. c. 110), enabled to call on the unions of the county at large to contribute to the relief required in particular unions.

(*d*) 30 & 31 Vict. c. 6; 34 & 35 Vict. c. 70.

(*e*) The Queen *v.* Crediton, 1 Ell. Bl. & E. 231.

(*f*) R. *v.* Walthamstow, 6 Ad. & Ell. 301; Liverpool *v.* Portsea, 12 Q. B. D. 302; High Wycombe *v.* Marylebone, 13 Q. B. D. 15; Edmonton Union *v.* St. Mary, Islington, 15 Q. B. D. 95; Reigate Union *v.* Croydon Union, 14 App. Ca. 465.

parentage,—for a legitimate child takes the last settlement of its father, or of its widowed mother (as the case may be), till it attains the age of sixteen, and afterwards until it acquires another; and a bastard child now retains the settlement of his mother until he gains another for himself (*g*). (3.) By *marriage*,—for a female may claim the settlement which belongs to her husband, and she retains that settlement after his death (*h*); but if her husband has no settlement, or if his settlement is unknown, she retains that which belonged to her before her own marriage; and she cannot acquire one, in her own right, during the marriage. (4.) By *renting a tenement;* and for this it is requisite, that the party shall have *bonâ fide* rented the tenement, and that the tenement shall be a separate or distinct tenement, and that the rent thereof shall be the sum of 10*l.* a-year at the least for the term of one whole year; and the party must have occupied the tenement and paid the rent for the term of one whole year at the least, and must for the same period have been assessed to and have paid the poor rate in respect thereof (*i*). (5.) By being *bound apprentice* (*k*), and *inhabiting* for forty days under such binding,—either in the same parish where the service takes place, or in a different one; but no settlement can be acquired by being apprenticed in the sea service, or to a householder exercising the trade of the seas, as a fisherman or otherwise (*l*); and the indenture of ap-

(*g*) 39 & 40 Vict. c. 61, s. 35; Westbury-on-Severn *v.* Barrow-in-Furness, 3 Ex. D. 88; Great Yarmouth *v.* City of London, 3 Q. B. D. 232; The Queen *v.* Bridgenorth Guardians, 9 Q. B. D. 765; 11 Q. B. D. 314.

(*h*) 4 & 5 Will. 4, c. 76, s. 71; 39 & 40 Vict. c. 61, s. 35.

(*i*) 6 Geo. 4, c. 57, s. 2; 1 Will. 4, c. 18, s. 1; 4 & 5 Will. 4, c. 76, s. 66; R. *v.* Kibworth Harcourt, 7 Barn. & Cress. 790; R. *v.* Halifax, 4 Ell. & Bl. 647; R. *v.* Snape, 6 A. & E. 278; Overseers of Willesden *v.* Paddington, 3 Best & Smith, 593; The Queen *v.* Exeter, Law Rep., 4 Q. B. 341.

(*k*) R. *v.* Billinghay, 5 A. & E. 676; R. *v.* Barton-upon-Irwell, 3 Best & Smith, 604; St. Pancras *v.* Clapham, 2 Ell. & Ell. 742.

(*l*) 4 & 5 Will. 4, c. 76, s. 67; R. *v.* Maidstone, 5 A. & E. 326.

prenticeship must in all cases have been executed by the apprentice, except in the case of one bound by the parish (*m*). (6.) By *estate*,—for a settlement is gained, of a temporary kind, in any parish, by having *an estate of one's own* there, of whatever value, and whether the interest be legal or equitable (*n*),—a species of settlement which appears to be founded on the principle of the common law, that a man shall not be removed from his own property (*o*); but no person may retain a settlement so gained for any longer time than he inhabits within ten miles thereof (*p*); and in case he ceases to inhabit within that distance, and afterwards becomes chargeable, he is liable to be removed to the parish in which he was settled previously to such inhabitancy, or else to the parish (if any) in which he has gained a settlement since the inhabitancy (*q*). (7.) By *payment of taxes*,—for a settlement may be gained by being *charged to and paying the public taxes, and levies of the parish* (*r*), provided (by 35 Geo. III. c. 101, s. 4) the tenement is of the yearly value of 10*l.*; and provided (by 6 Geo. IV. c. 57) the tenement (not being the person's own property) is a separate and distinct tenement, *bonâ fide* rented by him for 10*l.* a year at the least, and occupied for a year at least (*s*). And (8.) By *residence*,—for a settlement may also be acquired by *residing for the term of three years in a parish* in such manner and under such circumstances as to

(*m*) 4 & 5 Will. 4, c. 76, s. 15; 7 & 8 Vict. c. 101, s. 12; and the Merchant Shipping (Fishing Boats) Act, 1883 (46 & 47 Vict. c. 41), ss. 3—8, and (as to parish-bound apprentices), s. 12, repealed, but its provisions re-enacted, by the 57 & 58 Vict. c. 60.

(*n*) R. *v.* Ardleigh, 7 A. & E. 70; The Queen *v.* Belford, 3 B. & Smith, 662; Reg. *v.* Thornton, 2 Ell. & Ell. 788.

(*o*) 2 Nolan, 58.

(*p*) The Queen *v.* Saffron Walden, 9 Q. B. 76.

(*q*) 4 & 5 Will. 4, c. 76, s. 68; R. *v.* Hendon, 2 Q. B. 455.

(*r*) 3 W. & M. c. 11, s. 6; 6 Geo. 4, c. 57, s. 2; 1 & 2 Will. 4, c. 42, s. 5; R. *v.* St. Giles, 7 Ell. & Bl. 205; Everton *v.* South Stoneham, 2 Ell. & Ell. 771; St. George's, Hanover Square *v.* Cambridge Union, Law Rep., 3 Q. B. 1.

(*s*) St. George's, Hanover Square *v.* Cambridge Union, supra.

be *irremovable* (*t*). And here it may be desirable to observe, that before the 14th August, 1834,—the date of the passing of the Poor Law Amendment Act, 1834,—settlements could be acquired by residence, accompanied with other circumstances of notoriety, viz., 1. By hiring and service, which was where a person, being unmarried and childless, was hired for a year, and served a year in the same service; and 2. By executing any public annual office or charge within the parish for one whole year.

And it is to be observed generally, that when by any of the modes above enumerated a person has gained a settlement in any parish, he is considered as settled there until he acquires a new one in some other place; but the later acquisition supersedes the earlier. And all those who stand in need of relief, and apply for it, are entitled to be relieved in the parish (or union) in which they happen to be, or to which, as it is commonly expressed, they are *chargeable;* for if settled there, they constitute its *settled* poor, and if not settled there, they are termed its *casual* poor (*u*). The parish is, however, exonerated from this burthen, if there is anyone competent and by law compellable to maintain the pauper; and those who are so compellable comprise the wife and husband, the father and grandfather, the mother and grandmother, or the children of the pauper (*x*), a husband being liable by 4 & 5 Will. IV. c. 76, ss. 56, 57, to maintain his wife's children born before his marriage with her, until the children attain sixteen years of age or their mother sooner dies. The measure or extent of this liability is prescribed by (and is at the rate assessed by) an order of the justices at their general quarter, or petty sessions (*y*); and on refusal to

(*t*) 39 & 40 Vict. c. 61, s. 34; The Queen *v.* Brampton Union, 3 Q. B. D. 479; The Queen *v.* Maidstone Union, 5 Q. B. D. 31.

(*u*) 33 Geo. 3, c. 35, s. 3; R. *v.* St. Pancras, 7 A. & E. 750.

(*x*) 43 Eliz. c. 2, s. 7; 31 & 32 Vict. c. 122, s. 33; 33 & 34 Vict. c. 93, s. 13; and 45 & 46 Vict. c. 75, s. 21.

(*y*) 59 Geo. 3, c. 12, s. 26.

obey such order, the sums so assessed are recoverable (with penalties) before two justices of the peace, and may be levied by distress and sale of the goods and chattels of the offender; in default of which, he may be committed to prison (*z*). And the better to secure the performance of this duty, it is provided by 5 Geo. I. c. 8, as amended by 12 & 13 Vict. c. 103, s. 3, that where any person shall run away from his place of abode, leaving his wife or children chargeable as paupers,—his goods, or any annual profits of his lands, may be seized under the warrant or order of two justices, and (if such warrant or order be confirmed by the sessions) may be applied towards the maintenance of such wife or children; and it is further provided by 5 Geo. IV. c. 83, that persons running away and leaving their wives or children so chargeable, shall be deemed *rogues and vagabonds*, and shall be liable to imprisonment for any time not exceeding three calendar months; and that persons wholly or in part able to maintain themselves or families by work or other means, but refusing or neglecting so to do, whereby they become so chargeable, shall be deemed *idle and disorderly persons*, and may be summarily convicted and imprisoned, in the house of correction with hard labour, for any time not exceeding one calendar month (*a*).

If there are no relations to whom recourse can be had, the *settled poor* must be relieved by the local authorities, so long as their necessity continues; but if they are able to work and refuse to do so, they may be committed to prison (*b*). On the other hand, with respect to the casual poor, they may, in general, be *removed* in the manner to be presently described; and they are entitled to relief only till such removal can be effected, and are in the meantime subject to the provisions of the 34 & 35 Vict. c. 108, and the Casual Poor Act, 1882 (45 & 46 Vict. c. 36), regulating

(*z*) 4 & 5 Will. 4, c. 76, ss. 78, 99; 11 & 12 Vict. c. 110, s. 8.

(*a*) Reeve *v.* Yeates, 1 H. & C. 435; Horley *v.* Rogers, 2 Ell. & Ell. 674.

(*b*) 43 Eliz. c. 2, s. 4; 55 Geo. 3, c. 137; 7 & 8 Vict. c. 101, ss. 57, 58.

their treatment in the casual wards and in the workhouses of the parish or union. Moreover, all casuals born in Scotland or Ireland, the Isle of Man, Scilly, Jersey, or Guernsey, and who have no settlement in England,—may, upon complaint of any guardian, relieving officer, or overseer, be removed by the order and warrant of two justices of the peace, or (in a proper case) of a stipendiary or metropolitan police magistrate (*c*), to the place of their birth, together with their families,—that is, with their wives and children, or such of them as are chargeable and have as yet acquired no settlement in their own right (*d*); and casuals who have a known place of settlement in England (wherever born) may be removed, by the like order and warrant, to the place of such settlement, together with their families (*e*); the removal order being in either case obtained, upon complaint of the parish (or union) to which the paupers have become chargeable (*f*), —the chargeability being proved by the certificate of the guardians (*g*); and notice in writing of the order, accompanied by a statement in writing of the ground of the removal, must be sent to the parish (or union) on which it is made (*h*). If the order is submitted to, or if no notice of appeal is given within twenty-one days, the pauper is to be removed accordingly; but if such notice is given within that period, the pauper is to be kept where he has become chargeable, until the appeal (if duly prosecuted) shall have been determined (*i*); and such appeal is to the court of

(*c*) 17 Geo. 2, c. 5; 59 Geo. 3, c. 12; 5 Geo. 4, c. 83; 8 & 9 Vict. c. 117, s. 4; 24 & 25 Vict. c. 76; 25 & 26 Vict. c. 113; 26 & 27 Vict. c. 89.

(*d*) Reg. *v.* St. Anne, Blackfriars, 2 Ell. & Bl. 440.

(*e*) 8 & 9 Vict. c. 119, s. 5; 9 & 10 Vict. c. 66, ss. 6, 7; 11 & 12 Vict. c. 31; 12 & 13 Vict. c. 103, s. 3; 14 & 15 Vict. c. 105, s. 13; 24 & 25 Vict. c. 76; 33 & 34 Vict. c. 48.

(*f*) 13 & 14 Car. 2, c. 12, s. 1.

(*g*) 7 & 8 Vict. c. 101, s. 69, and 11 & 12 Vict. c. 110, s. 11.

(*h*) 4 & 5 Will. 4, c. 76, s. 79; 11 & 12 Vict. c. 31, ss. 2, 3, 4; Reg. *v.* Yorkshire, 1 Ell. Bl. & Ell. 713; Reg. *v.* Ruyton, 1 Best & Smith, 534.

(*i*) 4 & 5 Will. 4, c. 76, ss. 79,

quarter sessions having jurisdiction for the place from which the removal is directed (*k*); and the court may order the parish (or union) against which the appeal shall be decided to pay reasonable costs to the other (*l*); and where the respondents succeed, such costs will include the relief and maintenance of the pauper from the time of the notice of the order of removal (*m*). In the event of some doubtful point of law arising, the justices may make their order in the appeal subject to a *special case;* or the parties may agree upon such special case, or have it stated by judge's order, without resorting to the quarter sessions at all (*n*); and the event follows the decision of the Queen's Bench Division upon the point of law. Also, if the party decided against is dissatisfied with the order made at sessions, a writ of *certiorari* issues from the Queen's Bench Division to remove the proceedings into the High Court; and the case is then argued there, and the order of sessions is then either affirmed or quashed, according to the law on the facts given in evidence at the sessions (*o*).

If a casual has no known place of settlement in England, and was not born in Scotland, Ireland, or other part of the United Kingdom, then he must remain of necessity in the place where he has become chargeable; and he may claim relief there so long as he continues to be in want, upon the same footing with its settled poor; unless and until some place be afterwards discovered wherein he may claim a settlement. There are also some particular cases in which the removal of a casual pauper to his or her place of settlement or birth is illegal; for the wife of such a pauper cannot be removed to her place of maiden settlement, so as to separate her from her husband, unless by

80, 81, 83; R. *v.* Kent, 6 B. & C. 639; R. *v.* Leominster, 2 B. & Smith, 391.

(*k*) The Queen *v.* Sussex, 4 B. & S. 966.

(*l*) 4 & 5 Will. 4, c. 76, s. 82; 12 & 13 Vict. c. 45, ss. 4, 5.

(*m*) 4 & 5 Will. 4, c. 76, s. 84.

(*n*) 12 & 13 Vict. c. 45, s. 11.

(*o*) R. *v.* Abergele, 5 Ad. & E. 795.

mutual consent (*p*); nor can a child (whether legitimate or otherwise) be taken away from its mother during its time of nurture, that is, until the age of seven years (*q*); and even though an order of removal be duly made, still if the pauper, by reason of sickness or infirmity, is not in a fit state to travel, the execution of the order must be suspended, till the justices are satisfied that it may be safely executed (*r*),—such suspension extending also to any others of the pauper's family included in the removal order (*s*); also, persons in legal custody cannot be removed, under the poor laws, from the parish where they are confined. And it is to be remembered, that, in general, no person may now be removed from a parish (or union) in which he has resided for *one whole year* (*t*) (formerly *five* whole years and latterly *three* whole years) (*u*), next before the application for a warrant for his removal,—such period of residence sufficing to ensure his irremovability, although it should not confer on him a settlement (*x*); and further a pauper

(*p*) R. *v.* Eltham, 5 East, 113; R. *v.* St. Mary, Beverley, 1 B. & Ad. 201.

(*q*) R. *v.* Birmingham, 5 Q. B. 210; Re Ethel Brown, 13 Q. B. D. 614.

(*r*) 35 Geo. 3, c. 101, s. 2; 49 Geo. 3, c. 124; The Queen *v.* Llanllechid, 2 Ell. & Ell. 530; 24 & 25 Vict. c. 76; and 25 & 26 Vict. c. 113.

(*s*) 49 Geo. 3, c. 124.

(*t*) 28 & 29 Vict. c. 79, s. 8; Machynlleth *v.* Pool, Law Rep., 4 Q. B. 592; The Queen *v.* St. Olave's, ib. 9 Q. B. 38.

(*u*) 24 & 25 Vict. c. 55; 9 & 10 Vict. c. 66; 11 & 12 Vict. c. 111.

(*x*) Any time passed in prison (The Queen *v.* Potterhanworth, 1 E. & E. 262); or in military or naval service (The Queen *v.* East Stonehouse, 4 Ell. & Bl. 901; Easton *v.* St. Mary, Marlborough, Law Rep., 2 Q. B. 128); or as an in-pensioner in Greenwich or Chelsea Hospitals; or in confinement in a lunatic asylum; or as patient in a hospital; or during which parochial relief shall have been received (The Queen *v.* St. George's, Bloomsbury, 4 B. & Smith, 108), is to be excluded from the computation of time; and as to an *interruption* of the residence, see 12 & 13 Vict. c. 103, s. 4; R. *v.* Stapleton, 1 E. & B. 766; Wellington *v.* Whitchurch, 4 B. & Smith, 100; The Queen *v.* St. Leonard's, Shoreditch, Law Rep., 1 Q. B. 21; Reg. *v.* Glossop, ib. 227; Reg. *v.* Whitby, ib. 5 Q. B. 325; Reg. *v.* Abingdon, ib. 406; Reg. *v.* St. Ives, ib. 7 Q. B. 467; Reg. *v.* Worcester Union, ib. 9 Q. B. 340.

may not now be removed for becoming chargeable in respect of relief made necessary by sickness or accident, unless the justices shall state in the warrant that they are satisfied that the sickness or accident will produce permanent disability (*y*); and a woman residing with her husband at the time of his death cannot be removed till twelve calendar months afterwards (*z*), if she shall so long continue his widow (*a*); and a woman deserted by her husband becomes irremovable after three years' desertion (*b*); and a child under the age of sixteen, whether legitimate or illegitimate, residing with his or her father or mother, stepfather, or stepmother, or reputed father, may not be removed unless the person with whom such child is residing may lawfully be removed (*c*).

Secondly, as regards the administration of poor law relief.—The duty of administering *relief*, where a parish is under the government of guardians, or of a select vestry, belongs to those authorities, according to the provisions of the Acts (including the Local Government Act, 1894, to be presently mentioned) under which they have been respectively appointed, and subject to the superintendence of the Local Government Board; and where there are no such authorities, it belongs (subject to the same superintendence) to the overseers, or (where the poor law administration is governed by a local Act of Parliament) to the authorities by such Act established (*d*); and for these purposes, extra-parochial places are, in general, to be deemed parishes of themselves, unless when (by agreement) they are contributory places within some other

(*y*) The Queen *v.* St. George's, Middlesex, 2 B. & Smith, 317.

(*z*) Reg. *v.* Cudham, 1 E. & E. 409.

(*a*) 9 & 10 Vict. c. 66, s. 2.

(*b*) 24 & 25 Vict. c. 55, s. 3; The Queen *v.* St. Mary, Islington, Law Rep., 5 Q. B. 445; The Queen *v.* St. George's-in-the-East, Law Rep., 5 Q. B. 364.

(*c*) 9 & 10 Vict. c. 66, s. 3; 24 & 25 Vict. c. 55, s. 2; The Queen *v.* St. Mary Arches, Exeter, 1 B. & Smith, 890.

(*d*) 7 & 8 Vict. c. 101, ss. 64, 65; 11 & 12 Vict. c. 91, s. 12; and 30 & 31 Vict. c. 106, s. 2.

parish (*e*). In all cases, however, of *sudden and urgent necessity* arising in a parish under the government of guardians or of a select vestry, any overseer is empowered and required by law, whether the applicant for relief is settled in the parish or not, to give him or her such temporary relief as the case may require, in articles of absolute necessity; and if the overseer refuses to give such necessary relief, and the pauper is not settled or usually resident in the parish to which the overseer belongs, any justice of the peace may direct such necessary relief to be given, by an order under his hand or seal, the overseer who disobeys such order incurring a penalty not exceeding 5*l.* (*f*); and whatever may be the settlement or residence of the pauper, any justice of the peace is empowered to order *medical* relief in all cases of sudden and dangerous illness, the overseer here also being subject to the penalty of 5*l.*, in case of disobedience (*g*); also, in unions formed under the Poor Law Amendment Acts, any two justices of the peace usually acting for the district may, at their discretion, order any adult person, who is unable to work and is entitled to relief, to be relieved, if he desires it, without residing in the workhouse; but in such a case one of the justices must certify, of his own knowledge, that the person is unable to work (*h*). And it is now made lawful for the guardians to permit, at their discretion, a husband and wife admitted into a workhouse to live together, provided either of them shall be infirm, sick, or disabled by any injury, or shall be above the age of sixty years; but every such case must be reported forthwith to the Local Government Board (*i*). It is to be observed, however, that these particular or exceptional powers of overseers, and of magistrates, to afford relief, apply only in the case of

(*e*) 14 Car. 2, c. 12, s. 22; 20 Vict. c. 19; Queen *v.* St. Sepulchre, 1 El. & El. 813.

(*f*) 4 & 5 Will. 4, c. 76, s. 54.

(*g*) Ibid.

(*h*) 4 & 5 Will. 4, c. 76, s. 27; 11 & 12 Vict. c. 91, s. 12; 57 & 58 Vict. c. 25.

(*i*) 39 & 40 Vict. c. 61, s. 10.

parishes under the management of guardians or a select vestry (*k*); for in parishes not so circumstanced, the authority is not specific, but general, the duty of administering relief belonging, in the first instance, to the overseer; who, if he refuses the relief in any case, may be ordered to give it, by any justice of the peace residing in the parish, or (if there be none there resident) in the parish next adjoining, or by order of the justices in quarter sessions; and if the overseer disobey such order, he is liable to be indicted (*l*).

The duty of making and levying the poor rate or parochial fund for the relief of the poor belonged, and subject (as regards rural parishes) to the provisions of the Local Government Act, 1894, still belongs, to the churchwardens and overseers of the parish (*m*); and the concurrence of the inhabitants at large was not, and is not, necessary (*n*). And for the better execution of these duties, the statutes authorize the appointment of *collectors and assistant overseers* for the parish or (it may be) for the separate townships therein (*o*). And here it is convenient to observe, that the office of overseer is, in general, compulsory, excepting in the cases of the persons enumerated in the foot-note below (*p*); and a woman may fill the office (*q*); and the appointment of overseers, and also of assistant overseers,

(*k*) 4 & 5 Will. 4, c. 76, s. 54.

(*l*) 3 W. & M. c. 11, s. 11; 9 Geo. 1, c. 7, s. 1.

(*m*) As to the recovery of poor rates and other local taxes, see 43 Eliz. c. 2, ss. 12, 13; 12 & 13 Vict. c. 14; 25 & 26 Vict. c. 82.

(*n*) 43 Eliz. c. 2, s. 1; 7 & 8 Vict. c. 101, s. 63.

(*o*) 2 & 3 Vict. c. 84; 7 & 8 Vict. c. 101, ss. 61, 62; 29 & 30 Vict. c. 113; s. 10; 56 & 57 Vict. c. 73; R. *v.* Yorkshire, 6 A. & E. 863; R. *v.* Watts, 7 A. & E. 461; The Queen *v.* Greene, 17 Q. B. 793; Worth *v.* Newton, 10 Exch. 247; Smart *v.* West Ham Union, 11 Exch. 867.

(*p*) Peers and members of parliament; justices of the peace; aldermen of London; clergymen; dissenting ministers; practising barristers and solicitors; registered medical practitioners; and officers of the courts of law, of the army and navy, and of the customs and excise. (Archbold's Justice of the Peace, in tit. Poor, 13; 21 & 22 Vict. c. 90, s. 34.)

(*q*) R. *v.* Stubbs, 2 T. R. 395; 56 & 57 Vict. c. 73, s. 20.

is now (in the case of rural parishes) vested in the parish council, or (as the case may be) in the parish meeting, provided for by the Local Government Act, 1894 (*r*).

The poor rate is raised prospectively (*s*); and for some given portion (usually one half part) of the year; and at so much in the pound, according to the parochial assessment, and upon a scale adapted to the probable exigencies of the parish (*t*). And by 43 Eliz. c. 2, it is directed to be raised by taxation of every "*occupier* of lands, houses, "tithes impropriate, propriations of tithes (*u*), coal mines, "or saleable underwoods" in the parish; and a man is rateable for all that he *occupies* (*x*) in the parish, whether he is resident there or not,—for example, in respect of a *box* at a theatre (*y*), or in respect of *moorings* in the river (*z*), or in respect of *hoardings* used for advertising (*a*), or in respect of a tunnel, sewer, and the like; and corporate property (*e.g.*, the railroad of a railway company) is deemed for this purpose to be in the occupation of the corporation (*b*); but crown property (*c*) is exempt; also, county courts (*d*); and (by specific enactments) certain other properties are exempt, *e.g.*, (by 3 & 4 Will. IV. c. 30,) all churches and chapels; and (by 32 & 33 Vict. c. 40) all Sunday schools and ragged schools; but this exemption does not extend to elementary schools generally (*e*). The

(*r*) 56 & 57 Vict. c. 73, s. 5.

(*s*) R. *v.* Gloucester, 5 T. R. 346.

(*t*) 1 Nolan, 61, 62.

(*u*) R. *v.* Barker, 6 A. & E. 388; Re Hackney Rent Charges, 1 Ell. Bl. & Ell. 1.

(*x*) R. *v.* Ponsonby, 3 Q. B. 14; The Mersey Docks Cases, 11 House of Lords Cases, 443.

(*y*) Reg. *v.* St. Martin, 3 Q. B. 294.

(*z*) Cory *v.* Bristow, 1 C. P. D. 54.

(*a*) 52 & 53 Vict. c. 27.

(*b*) 4 & 5 Vict. c. 48; R. *v.* York, 6 A. & E. 419; Re Oxford Poor Rate, 8 Ell. & Bl. 184; South Eastern Railway Company *v.* Dorking, 3 Ell. & Bl. 491; Pimlico Tramway Company *v.* Greenwich, Law Rep., 9 Q. B. 9; Société Telegraphe *v.* Penzance Union, 12 Q. B. D. 552.

(*c*) Queen *v.* Stewart, 8 Ell. & Bl. 360; Martin *v.* West Derby Union, 11 Q. B. D. 145.

(*d*) Queen *v.* Manchester, 3 Ell. & Bl. 336.

(*e*) West Bromwich School Board *v.* Overseers, 13 Q. B. D. 929.

Act of Elizabeth was (after a long period of exemption) extended also, by the Rating Act, 1874 (*f*), and as from the 6th April, 1875, to land used for a plantation or wood, or for the growth of saleable underwood; and to rights of shooting and fishing; and to mines of every kind (other than the coal mines which were already rateable); and underwoods are now rateable under this Act, and not under the Act of Elizabeth. And here we shall observe, that, in general, the tenant (and not the landlord) is considered as the *occupier* within the statute (*g*); but if the hereditament be let for a term *not exceeding three months*, the occupier is entitled, under the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), s. 1, to deduct the amount paid by him, in respect of poor rate, from the rent due to the owner; and by sects. 3 and 4 of the same Act, where the yearly rateable value of a dwelling-house does not exceed 8*l.* (or in the Metropolis 20*l.*, in Liverpool 13*l.*, or in Manchester or Birmingham 10*l.*), the owner may be ordered to be rated instead of the occupier (*h*),—a provision so convenient for the collection of the rate, that it has been adopted also in connection with, *e. g.*, the highway rate (*i*).

The Act 43 Eliz. c. 2 further directed the poor rate to be raised, by the taxation of "every inhabitant, parson, vicar, and other" of the parish; and as an *inhabitant*, a man was formerly liable to be rated according to his apparent ability, that is, according to the value of the stock in trade, and other local and visible personal property, he had within the parish, and of which he made profit (*k*): but this liability to taxation, in regard to inhabitancy, on the profits of a man's stock in trade and other such personal property, was taken away, by the Act 3 & 4 Vict. c. 89,

(*f*) 37 & 38 Vict. c. 54; Crawshay *v.* Morgan, Law Rep., 5 E. & I. App. 304.

(*g*) R. *v.* Welbank, 4 M. & S. 222.

(*h*) Iles *v.* West Ham Union, 8 Q. B. D. 69; 8 App. Ca. 386.

(*i*) 45 & 46 Vict. c. 27.

(*k*) R. *v.* Lumsden, 1 W. W. & H. 587.

until the 31st December, 1841; and this temporary exemption has now, for some years, been annually continued, by the Expiring Laws Continuance Act of the year (*l*).

By 6 & 7 Will. IV. c. 96 no poor rate was to be of any force which should not be made on an estimate of the net annual value of the several hereditaments rated,—that is to say, the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant rates and taxes, and tithe commutation rent-charge (if any), but deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses (if any) necessary to maintain the premises in a state to command such rent; and this statute also prescribed in what form the rate should be made, and what particulars it should comprise (*m*); and required that the parish officers should sign a declaration at the end, to the effect that the particulars therein were true and correct as far as they had been able to ascertain by their best endeavours; and these provisions are substantially the provisions now applicable to the assessment of the poor rate; but by 25 & 26 Vict. c. 103, and 27 & 28 Vict. c. 39, further provisions have been made, for securing (by a fresh valuation where required) the uniform and correct assessment of the rateable hereditaments comprised within all unions formed (*n*), and also (by adoption) within unions not formed, under the Poor Law Amendment Acts; and a like provision is also now applicable to the metropolis (*o*).

By 43 Eliz. c. 2, s. 1, no rate was to be valid, unless it was allowed by two justices; and by 17 Geo. II. c. 3, public notice thereof was to be given at the parish church, on the Sunday next after the same had been so allowed (*p*).

(*l*) 45 & 46 Vict. c. 64; 48 & 49 Vict. c. 59; 57 & 58 Vict. c. 48.

(*m*) The Queen *v.* Eastern Counties Railway Company, 5 Ell. & Bl. 974.

(*n*) The Queen *v.* Justices of Kent, Law Rep., 6 Q. B. 132.

(*o*) 32 & 33 Vict. c. 67.

(*p*) 1 Vict. c. 45; Ormerod *v.* Chadwick, 16 Mee. & W. 367; Burnley *v.* Methley Overseers, 1 E. & E. 789.

The allowance by the justices was, however, held to be a mere matter of form (*q*): and, after allowance and publication, any person aggrieved by the rate, and having reasonable objection to it as irregular or unequal, might appeal against it to the next practicable quarter sessions of the peace having jurisdiction in the place for which it was made; and such appeals would still lie to these sessions, under the express provisions of the Local Government Act, 1888 (*r*), although the rating authority is now the administrative county council established by the last-mentioned Act (*s*). Rating appeals may also, in most cases, be preferred under the statute 6 & 7 Will. IV. c. 96, to the justices in petty sessions; who are, by the last-mentioned Act, required to hold, four times at least in every year, a special sessions for hearing poor rate appeals within their respective divisions (*t*); and the decision of the justices in such special sessions is conclusive, unless the parties impugning their decision shall, within fourteen days, give notice of appeal therefrom to the next general sessions or quarter sessions of the peace. And the justices in general sessions, or at quarter sessions, have power to affirm, quash, or amend the rate; or, if it become necessary to set the whole aside, may order the overseers to make a new rate (*u*); and they have authority also to award costs to the successful party (*x*): and they may state a special case for the opinion of the Queen's Bench Division; and their interest as ratepayers, it need hardly be mentioned, is no disqualification for their acting in these quasi-judicial capacities (*y*).

It is the duty of the overseers, and of all persons having the collection, receipt, or distribution of the poor rate, to

(*q*) R. *v.* Dorchester (Justices), Str. 393.

(*r*) 51 & 52 Vict. c. 41, s. 8.

(*s*) Ibid. s. 3.

(*t*) 6 & 7 Will. 4, c. 96, s. 6; 27 & 28 Vict. c. 39; The Queen *v.* Denbighshire, 15 Q. B. D. 451.

(*u*) 17 Geo. 2, c. 38, s. 6; 41 Geo. 3, c. 23; 6 & 7 Will. 4, c. 96, s. 6.

(*x*) Ibid.

(*y*) 40 & 41 Vict. c. 11.

render to the proper auditors, once in every half-year, (and oftener if required by the Local Government Board,) an account of all moneys received and expended, and to verify the same on oath if required (*z*); and they are not to make any profit by their office (*a*); and all balances remaining from time to time in the hands of the parish officers may be recovered from them (if necessary) by a summary proceeding before two justices of the peace (*b*); and the overseers are bound also, in all cases, to render an account at the end of their year of office (*c*).

Such is a general outline of the law relating to the poor; and for the minuter provisions of that law (relative, *e.g.*, to the provision of sites for workhouses, and to the temporary housing of the poor; and relative to their burial, their emigration, and the like) (*d*),—the student must consult the various Poor Law Acts themselves and the treatises upon Rating in general; and we will here only add, that *local rates* are, in general, levied upon the same assessment, and by the same officers, as the *poor's rate;* and the *county rate* is also now raised through the poor law officials (*e*). It will be remembered, however, that, by the Local Government Act, 1894 (56 & 57 Vict. c. 73), as mentioned at the end of the preceding chapter, provision has been made for the constitution of parish councils and parish meetings in all rural parishes throughout England and Wales; and under that Act (sect. 20), there are now no *ex officio* guardians of

(*z*) 42 & 43 Vict. c. 6.

(*a*) 4 & 5 Will. 4, c. 76, s. 77; Henderson *v.* Sherbourne, 2 Mee. & W. 236.

(*b*) 1 & 2 Will. 4, c. 60; 4 & 5 Will. 4, c. 76, ss. 47, 99; 2 & 3 Vict. c. 84; 7 & 8 Vict. c. 101, ss. 32—38; R. *v.* St. Marylebone, 5 Ad. & El. 268.

(*c*) 4 & 5 Will. 4, c. 76, s. 47.

(*d*) 4 & 5 Will. 4, c. 76; 5 & 6 Will. 4, c. 69; 5 & 6 Vict. c. 18; 7 & 8 Vict. c. 101; 11 & 12 Vict. c. 110; 12 & 13 Vict. c. 103; 13 & 14 Vict. c. 101; 14 & 15 Vict. c. 105; 18 & 19 Vict. cc. 79, 105, 119; 20 & 21 Vict. c. 13; 24 & 25 Vict. c. 55; 29 & 30 Vict. c. 113; 34 & 35 Vict. c. 70; 48 & 49 Vict. c. 52.

(*e*) 37 & 38 Vict. c. 54, s. 10.

the poor,—either in rural parishes or in any other parishes,—all poor law guardians being now made elective, and the electors being the duly registered parishioners. The election also of the *overseers*, and of the *assistant-overseers*, in all rural parishes, is by that Act entrusted to the parish council (sect. 5), or (when the parish has no council) to the parish meeting (sect. 19); and the churchwardens, as such, have ceased to be overseers (sect. 5),—the powers, duties, and liabilities of the churchwardens, and also of the vestry of the parish, so far as they relate to the poor law, being, by the Local Government Act, 1894, transferred to the parish council (sect. 6), or (as the case may be) to the parish meeting (sect. 19),—besides divers other specific powers, relating to matters which are only remotely connected with the poor laws, and including the matter of allotments and small holdings, and divers matters affecting the public health. And the Act contains also provisions for extending (under an order and orders of the Local Government Board) to municipal boroughs generally (including county boroughs or any other urban district) (sect. 33), the powers which by the Act are vested in the parish councils of rural parishes relative to the appointment of overseers and assistant overseers, besides other powers relative to the poor law; and these last mentioned provisions are made applicable also to the administrative county of London (sections 33 & 34) (*f*).

(*f*) Vide supra, pp. 51, 52, 54.

CHAPTER III.

OF THE LAWS RELATING TO CHARITIES—SAVINGS BANKS—FRIENDLY AND OTHER SOCIETIES.

FROM the subject of the maintenance provided for the destitute poor, we may pass, by no abrupt transition, to that of public charities, savings banks, and friendly and other kindred societies,—all of which have, for their paramount object, the aid or relief of poverty.

I. And firstly, PUBLIC CHARITIES, or CHARITIES simply. —These have been always much favoured by the law (*a*); for "no time," as Lord Coke observes, "was so barbarous "as to abolish learning, or so uncharitable as to prohibit "relieving the poor" (*b*). Wherefore, when by 23 Hen. VIII. c. 10 (*c*), gifts to *superstitious* uses were made void, gifts for *charitable* purposes were held not to fall within the provisions of that statute; and by the 39 Eliz. c. 5, (made perpetual by 21 Jac. I. c. 1,) any person was enabled, by deed enrolled in Chancery, to found a hospital and to give it a corporate existence, with capacity to take and purchase goods and chattels, lands and tenements, and this without the king's licence in mortmain, and subject only to these conditions, that the lands were *freehold*, in fee simple, of the clear annual value of 10*l.*, and

(*a*) Bac. Ab. Ch. Uses, E.
(*b*) Porter's case, 1 Rep. 26.
(*c*) 37 Hen. 8, c. 4; 1 Edw. 6, c. 14.

not exceeding 200*l.* in annual value. And by the Statute of Charitable Uses (43 Eliz. c. 4), the lord chancellor was empowered to award commissions, to inquire of all gifts to such uses, and of all abuses and breaches of trust relative thereto, and to make orders for the future management of the charity funds (*d*); but the universities and cathedrals, and all colleges, hospitals, and free schools, having special visitors or governors, were excepted from this provision (*e*). And whereas the statutes of mortmain prohibited, in general, the endowment of collegiate or corporate bodies with land without the king's licence, and some doubts arose, at the time of the Revolution, as to the right of the crown to grant such a licence, which appears to have been supposed to be an exercise of the dispensing power (*f*),—therefore, by the statute 7 & 8 Will. III. c. 37, after reciting that it would be a great hindrance to learning and other good and charitable works, if persons inclined to grant lands to bodies incorporated for good and public uses should not be permitted to do so,—it was enacted (in confirmation and extension of the prerogative antecedently vested in the crown in this particular), that the king might grant to any persons whatever, a licence to alien, purchase, or hold in mortmain (*g*).

So far the interposition of the legislature had been uniformly favourable to charities. Some abuses, however, were afterwards found to attend the power of disposing of lands *by will* for purposes of this description; and therefore, by 9 Geo. II. c. 36, (after reciting that many large and inprovident alienations of land to charitable uses had of late been made by dying persons,) it was enacted, that no lands or hereditaments, or money to be laid out in the purchase thereof, should be given or conveyed, or anyways charged or encumbered, in trust for or for the benefit of any such uses,—unless by such conveyance *inter vivos*, and

(*d*) 1 Bac. Ab. Ch. Uses, F.; 3 Bl. Com. 436; 2 Vern. 118.

(*e*) Collison's case, Hob. 136.

(*f*) Hovenden's Blackst. vol. ii. p. 272.

(*g*) Vide sup. vol. i. p. 429.

under such conditions as the Act specifies; and these need not here be further referred to, as we had occasion to consider this statute, and certain recent enactments by which it has been amended, in a former volume (*h*); and it will here suffice to say, that there is now practically no restraint whatsoever on gifts of lands by will for charitable purposes, —and pure personal estate always might (and of course still may) be bequeathed for these purposes.

Commissions under the 43 Eliz. c. 4, to redress abuses in charities, have been long disused, their place being supplied by remedies of a more simple character. For, independently of any statute, the king, as *parens patriæ*, has and (through the keeper of his conscience, the chancellor) (*i*) exercises a general superintendence over all charities not otherwise sufficiently protected; also, wherever necessary, the king's attorney-general, at the relation of some informant (who is called the *relator*), may institute proceedings in Chancery, in his official capacity, to have the charity established, or to have the charity funds duly administered (*k*); and it is not essential that the relators should be the persons principally interested, for any persons (though the most remote of those who fall within the contemplation of the charity) may be relators (*l*); also, by 52 Geo. III. c. 101, commonly called Sir Samuel Romilly's Act, in every case of the breach of any charitable trust, or wherever the direction of the court is necessary for the administration of such a trust, any two or more persons may, on obtaining the previous sanction of the attorney or solicitor-general, apply for relief by *petition*, to be heard and disposed of in a summary way; also, under the Charitable Trusts Acts hereinafter referred to, and under the general jurisdiction of the court as regulated by the

(*h*) Vide sup. vol. I. pp. 431—434.

(*i*) 3 Bl. Com. 427.

(*k*) 3 Bl. Com. 428; Eyre *v.* Countess of Shaftesbury, 2 P. Wms. 118; Caldwell *v.* Pagham Harbour Reclamation Company, 2 Ch. D. 221.

(*l*) Attorney-General *v.* Bucknall, 2 Atk. 328.

orders and rules of 1883, divers summary applications for the due administration of charitable trusts are made competent.

By the statute 52 Geo. III. c. 102, provision was made for the registration of charitable donations, in order to prevent their benefits from being lost, the Act directing, as regards all then existing charities, that a memorial stating the funds and objects thereof, the names of the founders (when known), the persons having the custody of the title deeds of the endowment, and the trustees or possessors of the estates, should be registered with the clerk of the peace of the county or town, and a duplicate of such memorial transmitted to Chancery; and the Act further directed, as regards all future charities, that the like memorial should be registered within twelve months after the decease of the donor; but donations not secured on land or permanently invested in the funds, and donations the management of which was left to the discretion of trustees, were (with many other particular cases) excepted from the Act; and the registration of such charitable gifts is part of the business which, by the Local Government Act, 1888 (*m*), s. 3, has now been transferred to the county councils established by that Act, and the clerk of the peace is made the clerk of such council.

The protection of charitable endowments was also otherwise secured, by a variety of statutes passed previously to the present reign (*n*); but these need not here be particu-

(*m*) 51 & 52 Vict. c. 41.

(*n*) See 58 Geo. 3, c. 21, and 59 Geo. 3, cc. 81, 91, which authorized the appointment of commissioners to inquire into endowed charities, and to certify to the Attorney-General such cases as they found to require the interference of equity; 1 & 2 Geo. 4, c. 92, which empowered trustees of charity lands to exchange them in certain cases for others; 3 Geo. 4, c. 72, s. 11, which authorized the apportionment of the charitable endowments of any parish divided under the Church Building Acts; 9 Geo. 4, c. 85, which quieted the titles of lands purchased for charitable purposes; 1 & 2 Will. 4, c. 60, s. 39, which directed lists of the charitable endowments of the parish to be made by the vestries adopting

larly examined; for by a group of statutes known as "The Charitable Trusts Acts," 1853 to 1887 (*o*), a body or Board of Commissioners, called the "Charity Commissioners for England and Wales," has been established, with power to examine into all charities, and to prosecute all due inquiries by its officers (including the Assistant Commissioners, formerly called inspectors); and with powers also to require charity trustees and others, to render to the Board written accounts and statements, or to attend and be examined on oath, in relation to any charity or its property;—to authorize actions and proceedings concerning the same;—to sanction building leases, repairs, and improvements, and sales and exchanges of charity lands;—to frame and to approve new schemes, and (in cases of difficulty) to certify to parliament, for the approval of parliament, any such new schemes, for the better management of charities (*p*);—and to permit a great variety of other acts to be done in relation to charities, such as the varying circumstances of each case may from time to time require (*q*). And by one of these Acts (25 & 26 Vict. c. 112), the Board may (subject to certain restrictions) appoint or remove any charity trustees, or any schoolmaster or schoolmistress, or other officer of the charity; but this branch of their jurisdiction is not to be exercised, except on the application of the majority of the trustees, where the gross annual income of the charity amounts to 50*l.* or upwards; and no trustee is to be removed on the ground, only, of his

that Act; 2 Will. 4, c. 57, s. 3, which provided for the supply of new trustees, where the original trustees of a charity were dead and the representative of the last survivor could not be found; 4 & 5 Will. 4, c. 76, s. 74, which empowered the Local Government Board to require from trustees for the poor, a true account in writing of the particulars of their trust; and 56 & 57 Vict. c. 73, s. 14, as to public charities (other than ecclesiastical charities) in rural parishes.

(*o*) 16 & 17 Vict. c. 137; 18 & 19 Vict. c. 124; 23 & 24 Vict. c. 136; 25 & 26 Vict. c. 112; 32 & 33 Vict. c. 110; and 50 & 51 Vict. c. 49.

(*p*) 16 & 17 Vict. c. 137, ss. 54, 60; 24 & 25 Vict. c. 32.

(*q*) 21 & 22 Vict. c. 71.

religious belief (sect. 4); and the Board is not to exercise jurisdiction, in any case which by reason of its contentious character, or of any special question of law or fact which is involved therein, they may consider more fit to be dealt with by the court (sect. 5),—the court here referred to being the Court of Chancery where the gross annual income of the charity exceeds 50*l.*, and being the county court for the district having jurisdiction in bankruptcy where the gross annual income only reaches or falls below that sum (*r*); and an appeal, by way of petition, lies from the orders of the Commissioners, to the Court of Chancery (*s*).

The Acts under consideration also authorize the appointment of corporate bodies, called "The Official Trustees of Charity Lands," and "The Official Trustees of Charitable Funds," in whom respectively the lands, stocks, securities, and moneys of charities may, under such circumstances as pointed out therein, from time to time become vested by order of the court (*t*); and the Commissioners may order these corporations respectively to convey the land, or to assign and pay over the stocks, securities, and moneys, as they shall think expedient (*u*). And although, by the 22 & 23 Vict. c. 50, charities or institutions *exclusively for the benefit of Roman Catholics* were for some time exempt from the jurisdiction of the Charity Commissioners, these charities are now, to a certain extent, subject to that jurisdiction, the statute 23 & 24 Vict. c. 134 having enacted, that, in cases where an estate is given on trust for the exclusive benefit of Roman Catholics, but is invalidated by reason of certain of the trusts being of the class deemed superstitious or otherwise illegal, such estate or its income shall be apportioned in Chancery, or by the Charity Commissioners, and a fixed proportion thereof shall be declared

(*r*) 16 & 17 Vict. c. 137, s. 36; 23 & 24 Vict. c. 136, s. 11.

(*s*) 23 & 24 Vict. c. 136, s. 8, and 32 & 33 Vict. c. 110, ss. 10, 11.

(*t*) 16 & 17 Vict. c. 137, ss. 48, 53; 18 & 19 Vict. c. 124, s. 15, &c.

(*u*) 18 & 19 Vict. c. 124, s. 37; 50 & 51 Vict. c. 49.

subject to the lawful trusts, and the residue subject to such trust for the benefit of persons professing the Roman Catholic religion, as the court or board may, under the circumstances, consider just; and a scheme for giving effect to such apportionment may be established. Also, by the 46 & 47 Vict. c. 36 (the City of London Parochial Charities Act, 1883), the Charity Commissioners have been entrusted (subject to the regulation of the High Court) with the management and disposition of the parochial charities within the City; and under the 56 & 57 Vict. c. 73 (the Local Government Act, 1894), the Charity Commissioners exercise a controlling power over the charities of rural parishes, the management of which has by that Act been vested in the parish councils thereby created.

A great number of cases, however, are exempted from the operation of the Charitable Trusts Acts; for these Acts extend not (among other charities) to the universities of Oxford, Cambridge, London, or Durham, or to any college or hall in those universities; or to any cathedral or collegiate church (*x*); or to the colleges of Eton and Winchester (*y*); but as regards "Prison Charities" within the Prison Charities Act, 1882 (*z*), these are only partially exempt from the jurisdiction of the charity commissioners. Any excepted charities may, however, petition the Board to have the benefit of the above enactments allowed to them; and any charities whatever may refer to the Board any questions or disputes arising between or among their members, touching or concerning the management of the charity (*a*).

Some account having now been given of the legislative enactments relating to charities, we will next advert to certain general principles which may be collected from the judicial decisions in regard to charitable donations, trusts, and endowments. And firstly, all trustees of charities

(*x*) 16 & 17 Vict. c. 137, s. 62.

(*y*) 18 & 19 Vict. c. 124, ss. 47—49.

(*z*) 45 & 46 Vict. c. 65.

(*a*) 16 & 17 Vict. c. 137, ss. 63, 64; 18 & 19 Vict. c. 124, s. 46.

may be called to account in Chancery for the funds committed to their charge; and new trustees, (where circumstances so require,) may be appointed (*b*); improvident alienations of charitable estates may be rescinded; schemes for carrying properly into effect the intentions of the donor, or (where the case calls for such interference) for varying his intentions in the manner hereinafter explained, may be established; and in fact every species of relief may be afforded, which it is in the nature of such institutions to require. In the case of corporations endowed for charitable purposes, the management is usually vested in governors, subject to a controlling or visitatorial power in the founder and his heirs, or in such persons as the founder shall appoint (*c*); and with the proceedings of such functionaries the law does not in general interfere, unless they have also the management of the revenues, and are found to be abusing their trust (*d*). It is to be observed, however, that when the king is the founder of an eleemosynary lay corporation, the visitatorial power is vested in the crown, and is committed by royal authority to the Lord Chancellor; who may thus be called upon to redress abuses properly falling within the province of a visitor: but this jurisdiction belongs to him in his personal character only, as representative of the crown, and not as a judge in Chancery (*e*). And here it may be convenient to observe, that the Local Government Act, 1894 (56 & 57 Vict. c. 73), transfers to and vests in the parish council of every rural parish all the charitable property (not being church property) theretofore vested in

(*b*) Such new trustees may also (without the aid of the court) be appointed under the Trustees Appointment Acts, 1850 to 1890 (13 & 14 Vict. c. 28; 32 & 33 Vict. c. 26; and 53 & 54 Vict. c. 19),—in the case of all trusts for religious or educational purposes.

(*c*) Eden *v.* Forster, 2 P. Wms. 326; R. *v.* Governors of Darlington Free Schools, 6 Q. B. 682.

(*d*) Berkhampstead Free Schools, 2 V. & B. 138; Attorney-General *v.* Talbot, 3 Atk. 673.

(*e*) Co. Litt. 96 a; Ex parte Dann, 9 Ves. 547; R. *v.* St. Catherine's Hall, 4 T. R. 233.

the overseers, or in the churchwardens and overseers, of the parish (sect. 5); and enables the parish council to acquire further endowments for the parish (sect. 8), and to deal therewith, subject to the control of the Local Government Board or of the Charity Commissioners (sects. 8, 14).

With respect to the nature of charitable trusts, we may remark, that the word *charitable* is to be understood in a very large sense; for not only gifts for the benefit of the poor are included, but also all endowments for the advancement of learning (*f*), as well as institutions for the advancement of science and art, and for any other useful and public purpose falling within the charitable uses enumerated in the preamble to the statute 43 Eliz. c. 4 (as such preamble is repeated in sec. 13 of the 51 & 52 Vict. c. 42), or falling within the meaning and intendment thereof (*g*); and the term comprises also donations for pious or religious objects, all objects being considered as religious which tend to the benefit either of the Established Church of England, or of any body of dissenters sanctioned by law (*h*); and trusts for the maintenance of the Roman Catholic worship (subject always to the law against uses deemed superstitious) are now placed on a similar footing (*i*). And though a trust for the advancement of the Jewish religion, as well as of any other faith hostile to Christianity, was at one time held illegal, and as such was excluded from the protection of Chancery (*k*),—it has been now provided, by 9 & 10 Vict. c. 59, s. 2, and 18 & 19 Vict. c. 86, s. 2, that her Majesty's subjects professing the Jewish religion shall be liable, in respect of their schools, places for religious worship, education, and other charitable

(*f*) Attorney-General *v.* Whorwood, 1 Ves. sen. 537.

(*g*) Attorney-General *v.* Heelis, 3 Sim. & Stu. 67; Trustees of British Museum *v.* White, ib. 594; Howse *v.* Chapman, 4 Ves. 551.

(*h*) Attorney-General *v.* Pearson, 3 Meriv. 409; Attorney-General *v.* Cock, 2 Ves. sen. 273.

(*i*) 2 & 3 Will. 4, c. 115; 18 & 19 Vict. c. 86, s. 2; 23 & 24 Vict. c. 134.

(*k*) In re Masters, &c. of the Bedford Charity, 2 Swanst. 487; 1 Dickens, 258.

purposes, and the property held therewith, to the same laws as those to which her Majesty's protestant subjects dissenting from the Church of England are liable, and to no other (*l*). But the definition of charitable trusts, although thus wide, does not extend to include gifts of a strictly private character; for if a sum of money be bequeathed with a direction to apply it "to such purposes of benevolence and liberality as the executor shall approve," or even "in private charity," no charitable trust will be created,—*scilicet*, no such trust as will be taken cognizance of in Chancery; but the property will, in such cases, belong to the next of kin, free from the direction (*m*). On the other hand, where a gift is for a purpose clearly falling within the description of charity, though expressed in the most general and indefinite terms, the trust will never be allowed to fail on account of its uncertainty; but the law will provide for it some particular mode of application; and sometimes the sovereign himself, by his chancellor or other great officer, but more usually the Court of Chancery, directs the disposition in such a case (*n*).

For it is a rule, with respect to all charities, that the intention of the donor, so far as it is practicable and legal, shall be strictly observed; the law not permitting it to be varied without necessity, even by consent of his heirs (*o*); but where such intention is incapable of being literally acted upon, or its literal performance would be unreasonable, a decree will be made for its execution *cy-près;* that is, in some method conformable to the general object, and adhering as closely as possible to the specific design of the donor (*p*). For example, where a sum of money was

(*l*) Vide sup. vol. II. p. 705.

(*m*) Morice *v.* Bishop of Durham, 10 Ves. 522; In re Sutton, Stone *v.* Att.-Gen., 28 Ch. Div. 464.

(*n*) Bac. Ab., Ch. Uses.

(*o*) Att.-Gen. *v.* The Margaret and Regius Professors in Cambridge, 1 Vern. 55.

(*p*) Att.-Gen. *v.* The Ironmongers' Company, 2 Mylne & Keen, 576; New *v.* Bonaker, Law Rep., 4 Eq. Ca. 655; Chamberlain *v.* Brockett, ib. 8 Ch. App. 206; In re Clark's Trusts, 1 Ch. D. 497.

bequeathed to trustees, to be distributed among the inhabitants of several specified parishes, in money, provisions, physic, or clothes, as the trustees should think fit, and the fund ultimately became too large to be suitably confined to those objects,—the court directed it to be applied to the further objects of instructing and apprenticing the children of those parishes to benefit which the charity was designed (*q*); and on a somewhat similar principle, as to meeting-houses founded for dissenters, it was declared by the 7 & 8 Vict. c. 45, sometimes called "Lord Lyndhurst's Act," and sometimes "The Dissenters' Chapels Act," that, where no particular religious doctrines or mode of worship shall have been prescribed by the deed or instrument of trust, the usage of the congregation for twenty-five years shall be taken as conclusive evidence of the doctrines and worship which may be properly observed or practised therein (*r*).

Lastly, we may remark, that, though among the civilians a legacy to pious or charitable uses was entitled to a preference over other bequests in a will, it is not so by our law, which directs that in the case of a deficiency of assets, the charitable legacies shall abate *pro ratâ* with the others (*s*); but the testator himself may give the charitable legacies a priority over all other legacies (*t*).

II. Secondly—Savings Banks.—These are institutions devised for the safe custody and increase of the small savings of the industrious poor; and when regulated according to Act of Parliament, certain benefits and protections are afforded to them by law (*u*). The earlier

(*q*) Att.-Gen. *v.* Whitchurch, 3 Ves. 141; Bishop of Hereford *v.* Adams, 7 Ves. 324; Att.-Gen. *v* Bovill, 1 Phill. 762; Att.-Gen. *v.* Mansfield, 14 Sim. 601; In re Campden Charities, 18 Ch. D. 310.

(*r*) Att.-Gen. *v.* Bunce, Law Rep., 6 Eq. Ca. p. 563.

(*s*) Bac. Ab., Ch. Uses, E.

(*t*) Miles *v.* Harrison, Law Rep., 9 Ch. App. 316; Ravenscroft *v.* Workman, 37 Ch. D. 637.

(*u*) Savings banks are provided by 22 & 23 Vict. c. 20, and 26 & 27 Vict. c. 12, for non-commissioned officers and soldiers in the army;

statutes which regulated the constitution, and defined the powers and privileges, of these banks, were principally the Acts 9 Geo. IV. c. 92; 5 & 6 Will. IV. c. 57; and 7 & 8 Vict. c. 83,—under which earlier statutes, many such banks were established, and some of them still exist; but the earlier statutes were repealed, and their provisions with amendments re-enacted, by the 26 & 27 Vict. c. 87 (The Savings Bank Acts Amendment Act, 1863); and the law on this subject is now contained in the last mentioned Act, as amended by the Acts specified in the foot-note (*x*).

Institutions thus sanctioned consist of banks for the receipt of small deposits of money, the produce of which is to accumulate at compound interest, and the principal and interest whereof are to be paid out to the depositors, as required, deducting only the necessary expenses of management; the deposits from a single depositor are not to exceed 50*l.* (formerly 30*l.*) in the whole, in any one savings bank year (*y*); and no fresh deposit is to be received from him, when the sum (inclusive of interest) amounts to 200*l.* (formerly 150*l.*) (*z*); and where the sum standing in the name of any depositor exceeds 200*l.* (principal and interest included), interest is to be for the future allowed on 200*l.* only (part thereof), and not on the excess (*a*); moreover, all sums in excess of 200*l.* are to be invested (unless the depositor otherwise directs) in government stock (*b*); and the whole amount of such stock credited to the account of the depositor is never at any one time to exceed 500*l.* stock (*c*); and not more than 200*l.* stock

and by 57 & 58 Vict. c. 60 (ss. 145—154), repealing (but re-enacting the provisions of) 17 & 18 Vict. c. 104, s. 180; 18 & 19 Vict. c. 91, s. 17; 19 & 20 Vict. c. 41; and 29 & 30 Vict. c. 43, for seamen in the navy, and in the mercantile marine.

(*x*) 29 & 30 Vict. c. 5; 32 & 33 Vict. c. 59; 39 & 40 Vict. c. 52; 43 & 44 Vict. c. 36; 44 & 45 Vict. c. 55; 46 & 47 Vict. cc. 47, 54; 47 & 48 Vict. cc. 2, 23; 50 & 51 Vict. cc. 40, 47; 54 & 55 Vict. c. 21; and 56 & 57 Vict. c. 69.

(*y*) 26 & 27 Vict. c. 87, s. 39; 56 & 57 Vict. c. 69, s. 1.

(*z*) 54 & 55 Vict. c. 21, s. 11.

(*a*) Ibid.

(*b*) 56 & 57 Vict. c. 69, s. 3.

(*c*) Ibid. s. 2.

is to be credited to his account in any one savings bank year (*d*).

The management of savings banks is vested in trustees (whence also these banks are commonly described as Trustee Savings Banks, to distinguish them from the Post Office Savings Banks to be presently mentioned); and these trustees must (by the rules of the bank) be prohibited from receiving, directly or indirectly, any benefit from a deposit made in the bank; and they are required to remit the money deposited (with the exception of what is retained in the hands of the treasurer to answer exigencies) to the Bank of England (*e*), to an account kept in the names of the National Debt Commissioners, and denominated "The Fund for the Banks for Savings;" and on this account, interest at the rate of 3*l.* per cent. (formerly 3*l.* 5*s.* per cent.) per annum is payable to the trustees (*f*), the interest payable to depositors themselves being limited to 2*l.* 15*s.* per cent. (formerly 3*l.* 0*s.* 10*d.*) per annum (*g*). Various provisions have also been made, to secure the proper management of savings banks (an inspection committee having been appointed for their regulation by the 54 & 55 Vict. c. 21); and other provisions have also been made, to save unnecessary expense and inconvenience to the members of these institutions; *e.g.*, in the case of the decease of a depositor whose estate does not exceed 50*l.*, no legacy duty attaches, and no stamp duty is payable for probate or administration (*h*); and if a depositor dies having a deposit not exceeding 100*l.* (*i*) (formerly 50*l.*) exclusive of interest, and no will or letters of administration are produced within one month afterwards, the money may be paid to such person or persons as shall appear to the trustees or managers to be the widow, or entitled thereto under the Statutes of Distributions, or according to the rules of the

(*d*) 56 & 57 Vict. c. 69, s. 2.
(*e*) Sect. 15.
(*f*) 43 & 44 Vict. c. 36, s. 2.
(*g*) 26 & 27 Vict. c. 87, s. 23; 43 & 44 Vict. c. 36, s. 2.
(*h*) 26 & 27 Vict. c. 87, ss. 41, 42.
(*i*) 46 & 47 Vict. c. 47, s. 5; 50 & 51 Vict. c. 40, s. 3.

bank (*k*); and upon the same principle, deposits by or on behalf of a minor may be paid to such minor himself (*l*); and all deposits made by a married woman were to be paid to such woman herself, unless her husband gave notice of the marriage, and required payment thereof to be made to him (*m*); but now, under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 6,—repealing and re-enacting a corresponding provision in the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 2, any deposit in a savings bank, made after the 9th August, 1870, in the name of a married woman, or in the name of a woman who shall marry after such deposit, shall be deemed her separate property and shall be accounted for and paid over to her as if she were an unmarried woman. And upon the same principle of convenience and economy, the Acts have provided, that all disputes between the institution at large and any of its members or their representatives shall be referred to the arbitrator appointed by the Acts for that purpose; and under the Savings Bank (Barrister) Act, 1876 (39 & 40 Vict. c. 52), the arbitrator, in the case of all such disputes, is now the Registrar of Friendly Societies (*n*).

Any persons forming themselves into a society for the purpose of establishing a savings bank, are entitled to claim for it the benefit of these parliamentary provisions, upon causing their rules and regulations to be entered in a book, to be kept by one of its officers for the inspection of depositors. It was requisite, however, that such rules and regulations should have been certified by the barrister appointed for that purpose (*o*); and these rules and regulations must still be certified to be in conformity with law and with the Savings Bank Acts; and the Registrar of Friendly Societies is now the barrister appointed for that

(*k*) 26 & 27 Vict. c. 87, s. 43.
(*l*) Sect. 30.
(*m*) Sect. 31.
(*n*) R. *v.* Mildenhall Savings Bank, 6 Ad. & E. 952; R. *v.* Norwich Savings Bank, 9 Ad. & E. 729.
(*o*) 26 & 27 Vict. c. 87, s. 4.

purpose (*p*); moreover, the formation of any savings bank established after the 28th July, 1863, must be sanctioned by the treasury (*q*); and, in some respects, all savings banks are subject to the control of the treasury (*r*). And it is not lawful for any trustee savings bank to purport (by its name or otherwise), that the government is responsible or liable to its depositors for the moneys deposited (*s*); and every such bank is now required to describe itself as a "savings bank certified under the Act of 1863" (*t*); whence many of these banks have latterly registered themselves under the Companies Acts, 1862—1867, and have (strictly speaking) ceased to be savings banks.

The institution of savings banks in general having been found deserving of continued encouragement under proper regulation, it was thought expedient to establish a species of savings bank which should be managed by the authorities of the Post Office, and which should enjoy the advantage of the direct security of the government for the repayment of its deposits; and this species of savings bank (called a Post Office Savings Bank) has accordingly been established, under the provisions of the Act 24 & 25 Vict. c. 14 (usually cited as the Post Office Savings Bank Act, 1861) (*u*); which authorizes the post-master general, with the consent of the treasury, to cause his officers to receive deposits, in all towns in which a branch office for that purpose is appointed, for remittance to the principal office; and to repay the same, under such regulations as shall from time to time be prescribed (*x*). Each depositor is to receive from the post-master general, through the branch office at which the deposit is made, an acknowledgement of its amount, which shall be conclusive evidence of

(*p*) 39 & 40 Vict. c. 52, s. 2.
(*q*) 26 & 27 Vict. c. 87, s. 2.
(*r*) 39 & 40 Vict. c. 52, s. 2; 50 & 51 Vict. c. 40.
(*s*) 54 & 55 Vict. c. 21, s. 1.
(*t*) Ibid.
(*u*) This statute has been since amended by the 26 & 27 Vict. c. 14; 37 & 38 Vict. c. 73; 43 & 44 Vict. c. 36; 44 & 45 Vict. c. 20; 50 & 51 Vict. c. 40; and 56 & 57 Vict. c. 69.
(*x*) 24 & 25 Vict. c. 14, s. 1.

his claim to repayment within ten days after demand, with interest thereon at the rate of 2*l.* 10*s.* per cent. per annum (*y*). The moneys deposited are to be forthwith paid over to the National Debt Commissioners (*z*), to be by them invested in such securities as are lawful for the funds of other savings banks (*a*); and if at any time the funds so created shall be insufficient to meet the lawful claims of all depositors, the treasury is empowered to make such deficiency good out of the consolidated fund (*b*). And it is further enacted, that the accounts, both of the post-master general and of the commissioners, in respect of all moneys deposited with or invested by them respectively under the Act, shall be audited by the comptroller general of the exchequer and auditor general of the public accounts (*c*); and that an account of all deposits received and paid during the current year shall be submitted to both houses of parliament (*d*). The Act also contains provisions enabling any person, who has made a deposit under it, to transfer the amount to any trustee savings bank; and for the transfer, on the other hand, of the amount due to any depositor in any trustee savings bank, to any post office savings bank (*e*).

In connection with these institutions, it may be here noticed, that, by 16 & 17 Vict. c. 45 (as amended by 27 & 28 Vict. c. 43, 45 & 46 Vict. c. 51, and 50 & 51 Vict. c. 40, s. 9), the National Debt Commissioners may grant to any depositor in any savings bank, or other person whom they shall think entitled to be regarded as a depositor, an *immediate* or *deferred* life annuity depending on a single life; or an *immediate* annuity depending on joint lives with benefit of survivorship, or depending on the joint con-

(*y*) Sects. 2, 3, 7.
(*z*) Sect. 5.
(*a*) Sect. 9.
(*b*) Sect. 6.
(*c*) Sect. 13; 29 & 30 Vict. c. 39, s. 5; 43 & 44 Vict. c. 36; and 45 & 46 Vict. c. 51.
(*d*) 24 & 25 Vict. c. 14, s. 12; 37 & 38 Vict. c. 73, s. 3.
(*e*) 24 & 25 Vict. c. 14, s. 10; 26 & 27 Vict. c. 14.

tinuance of two lives; or a sum (not exceeding 100*l.*) to be paid on the death of any person; such annuities and insurances respectively being placed under the sole management of the officers of *Post Office* savings banks.

The Acts relating respectively to trustee savings banks and to post office savings banks have much in common, and the regulations made or sanctioned by the treasury thereunder present also much similarity; and the labour of distinguishing accurately between the provisions and regulations respectively applicable to each is comparatively as useless as it would be tedious; and such labour has latterly been, or will shortly be, saved altogether, in consequence of the provision of the Savings Bank Act, 1887 (50 & 51 Vict. c. 40), ss. 1, 2, whereby the regulations applicable to either may (by order of the treasury) be made applicable also to the other. Moreover, a trustee savings bank is now placed (as regards the integrity of its management) as effectively under the control of the treasury as any post office savings bank necessarily is, provision having been made, by the Trustee Savings Bank Act, 1887 (50 & 51 Vict. c. 47), for the appointment by the High Court of Justice, on the application of the treasury, of a commissioner to examine into the state of the affairs of any trustee savings bank, on any *primâ facie* case made for such an examination (*f*); and by the 54 & 55 Vict. c. 21, s. 2, inspectors of savings banks (as we have seen) have also latterly been appointed; also, in a proper case, such a savings bank may be ordered to be wound up, as an unregistered association, under the Companies Acts, 1862—1867 (*g*).

III. Thirdly—Friendly Societies.—These societies, and some others of a somewhat similar character, are now mainly governed by the 38 & 39 Vict. c. 60 (The Friendly Societies Act, 1875), which repealed all the earlier Acts (*h*),

(*f*) Sect. 2.
(*g*) Sect. 3.
(*h*) 18 & 19 Vict. c. 63; 21 & 22 Vict. c. 101; and 23 & 24 Vict.

and which has itself been variously amended and explained by the 39 & 40 Vict. c. 32, 42 & 43 Vict. c. 9, 45 & 46 Vict. c. 35, 50 & 51 Vict. c. 56 (The Friendly Societies Act, 1887), and 52 & 53 Vict. c. 22,—the Acts of 1875 and 1887 being those of principal importance. And under these Acts, may be registered the following classes of societies:—

1. *Friendly societies*, established to provide by voluntary subscriptions of the members, either with or without the aid of donations, for one or other of the following objects:—(i.) For the relief or maintenance of the members, their families, relations, or orphan wards, during sickness or other bodily or mental infirmity, or after the age of fifty, or in widowhood, or for the relief or maintenance of the orphan infant children of members; (ii.) For insuring money to be paid on the birth of a member's child, or on the death of a member, or for funeral expenses; (iii.) For the relief or maintenance of members, when on travel in search of employment, or when in distress, or in case of shipwreck or loss or damage in respect of boats or nets; (iv.) For the endowment of members or of their nominees at any age; or (v.) For insurance against fire, of tools or implements of trade, to the amount of 15*l.* (*i*); but no such society may grant any annuity exceeding 50*l.* per annum, or an assurance exceeding 200*l.* gross sum (*k*); also, careful enactments are made to prevent abuse in insurances on the lives of children (*l*).

2. *Cattle insurance societies*, for the insurance to any amount, against loss by death, of neat cattle, sheep, lambs, swine, and horses from disease or otherwise.

c. 58; but the Act 17 & 18 Vict. c. 56 (being the Act which specially provided for certain then existing friendly societies, whose powers extended to granting policies of assurance on the death of members exceeding 1,000*l.*) is still in force, excepting as regards the proviso in sect. 8; but such societies are no longer to be deemed friendly societies.

(*i*) 38 & 39 Vict. c. 60, s. 8 (sub-s. 1).

(*k*) 38 & 39 Vict. c. 27.

(*l*) 38 & 39 Vict. c. 28.

3. *Benevolent societies*, for any benevolent or charitable purpose.

4. *Working men's clubs*, for purposes of social intercourse, mutual helpfulness, mental and moral improvement, and rational recreation.

And 5. *Specially authorized societies*, for any purpose authorized by the treasury (*m*).

Such being the different classes of societies which may be registered, it is to be observed, that the general superintendence of all friendly societies is entrusted to a chief registrar and assistant registrars (termed in the Act "the central office"), a report of whose proceedings is to be laid annually before parliament (*n*); and no society can apply to be registered which does not consist of seven persons at the least (*o*); and every registered society is required to have a registered office—to appoint trustees—and to submit its accounts for audit once at least in every year (*p*); and to send to the registrar an annual return of the receipts and expenditure, funds, and effects of the society, as well as quinquennial returns of certain particulars mentioned in the Act (*q*). A certificate of registration given by the registrar is *primâ facie* conclusive evidence of the due registration of the society; and in case of the registrar's refusal to register, an appeal lies to the Queen's Bench Division (*r*).

With respect to the privileges acquired by registration, these societies become thereby exempted from the provisions of 39 Geo. III. c. 79, and 57 Geo. III. c. 19, respecting *illegal combinations* (*s*); and also from the payment of

(*m*) *Trades unions* may also be registered (see 34 & 35 Vict. c. 31; 39 & 40 Vict. c. 22); and the registrar of friendly societies is also the registrar of trades unions; but such unions are not (properly speaking) friendly societies; nor do the Friendly Societies Acts in general include them. (The Queen *v.* Registrar of Friendly Societies, Law Rep., 7 Q. B. 741.)

(*n*) Sect. 10.

(*o*) Sect. 11.

(*p*) Sect. 14; 50 & 51 Vict. c. 56, s. 4.

(*q*) Ibid.

(*r*) Ibid.

(*s*) 38 & 39 Vict. c. 60, s. 15.

certain stamp duties which would otherwise be chargeable on them in the transaction of their business; and any member not under the age of sixteen may (subject to the regulations of the society) cause any money payable on his death to the extent of 100*l.* (formerly 50*l.*) to be paid over to his nominee, and exercise other rights from which his non-age would, under the general law, exclude him; and upon his death intestate without making any nomination, such money (not exceeding the amount aforesaid) may be paid over to the person or persons appearing to the trustees to be entitled thereto, without the necessity for administration (*t*). And further the society has, to a certain extent, a preference over other creditors in the case of the death, bankruptcy, or insolvency of its officers, with the money or property of the society in their possession (*u*); and as to the general property and funds of the society, the trustees may invest the same (subject to the Acts), either in a savings bank (post office or other), or in the public funds, or with the National Debt Commissioners; or even in the purchase of land, or in the erection of buildings thereon; or upon any other security expressly directed by the society's rules—not being (unless in the case of loans to members) personal security; and all property of the society vests in the trustees thereof for the time being, for the use and benefit of the society and its members (*x*). The Acts contain also provisions to the effect, that every dispute between a member, or one claiming under him or under the rules, and the society, shall be decided in such manner as shall be directed by the rules; and shall not be removable into any court of law; though the decision, when made, may be *enforced* by application to the county court of the district; but where the rules contain no direction as

(*t*) 38 & 39 Vict. c. 60, s. 15; 46 & 47 Vict. c. 47, s. 6; 50 & 51 Vict. c. 56, s. 5.

(*u*) 38 & 39 Vict. c. 60, s. 15.

(*x*) Sect. 61; 38 & 39 Vict. c. 60, s. 18; In re Coltman, Coltman *v.* Coltman, 19 Ch. D. 64; Royal Liver Friendly Society, Law Rep., 5 Exch. 78.

to disputes, or where the decision is unreasonably delayed, application for a decision may be made either to a court of summary jurisdiction—that is, to the justices—or to the county court (*y*). The Acts contain also minute provisions regulating the secession of lodges and branches, from other branches, or from the parent or principal society; and for the dissolution of the society, and the ascertainment and liquidation or distribution of its assets and liabilities (*z*).

There is a class of societies, called *industrial and provident societies*, similar in many respects to friendly societies, and which may be registered like those societies; and as from the 1st January, 1894, industrial and provident societies are now regulated by the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), which repeals the earlier Act 39 & 40 Vict. c. 45, but re-enacts, with divers amendments, the provisions of the repealed Act; and the principal Act itself has been, in some slight particulars, amended by the 57 & 58 Vict. c. 8; but regarding these societies, and certain others referred to in the foot-note below (*a*), we must refer the student to the Acts themselves, merely observing that they resemble, in most particulars, the ordinary friendly societies we have already spoken of.

IV. Fourthly, Benefit Building Societies.—These are societies established (subject to the provisions of the Building Society Acts) for the objects specified in their rules; and the principal object is usually to raise a subscription fund, by levies from the members of the society, and to make advances thereout to the members, to enable them to build or purchase dwelling-houses, or to purchase land, the advances being secured to the society by mortgage of the premises so built or purchased. The existing Building

(*y*) 38 & 39 Vict. c. 60, s. 22; 48 & 49 Vict. c. 27; 50 & 51 Vict. c. 56, s. 7.

(*z*) 38 & 39 Vict. c. 60, s. 23.

(*a*) 3 & 4 Vict. c. 110, and 26 & 27 Vict. c. 56 (as to *loan* societies); and 25 & 26 Vict. c. 44, and 28 & 29 Vict. c. 126 (as to *discharged prisoners' aid* societies).

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Society Acts are the 37 & 38 Vict. c. 42, 40 & 41 Vict. c. 63, 47 & 48 Vict. c. 41, and 57 & 58 Vict. c. 47, the first of these (called the Building Societies Act, 1874) being the principal Act. Under these Acts, societies of this description, (their rules being duly registered as required by the Acts, and being duly certified by the registrar,) enjoy certain special privileges and exemptions; and (among other privileges) their members enjoy the protection of limited liability; and may transfer their shares without payment of stamp duty; and may procure reconveyances of the property mortgaged by them to their society, by a mere receipt for the money advanced indorsed on the mortgage deed, and without incurring the expense of a formal re-conveyance (*b*); but the mortgage deed itself is not exempt from stamp duty, although the re-conveyance is exempt (*c*). These societies had originally no power to borrow (*d*),—in the absence at least of a rule expressly authorizing them to do so; but a limited power of borrowing money has now been conferred upon them by the principal Act (*e*). All disputes between the society and its members are to be settled by the convenient and economical method provided by the Act, being in general arbitration (*f*). Lastly, the society (which may be either a terminating or a permanent one) may be dissolved upon the happening of the event (if any) on which it is by the rules made to determine; or it may be dissolved in any manner as prescribed by its own certified rules or by the Act; or it may be wound up either voluntarily or compulsorily under the Companies Acts, 1862—1890 (*g*).

(*b*) 37 & 38 Vict. c. 42, ss. 14, 41, 42.

(*c*) Ibid. ss. 41, 42.

(*d*) Ex parte Watson, 21 Q. B. Div. 301; Blackburn Benefit Building Society's case, 9 App. Cas. 857.

(*e*) 37 & 38 Vict. c. 42, s. 15.

(*f*) 37 & 38 Vict. c. 42, ss. 34, 35; Mulkern *v.* Lord, 4 App. Cas. 182; and (since 47 & 48 Vict. c. 41) Western Suburban Society *v.* Martin, 17 Q. B. D. 66, 609; Municipal Society *v.* Richards, 39 Ch. Div. 372.

(*g*) 37 & 38 Vict. c. 42, s. 32; 57 & 58 Vict. c. 47, s. 8.

CHAPTER IV.

OF THE LAWS RELATING TO EDUCATION.

The subject of national education is one deserving the careful and even anxious attention of the legislature; for a good education (as distinguished from mere intellectual culture) operates not only as a correction of crime, but as an incentive also to invention; and although opinions may differ as to the details of any particular system of it, compulsory education in itself does not seem inconsistent with the principles of civil liberty, provided the regulations for enforcing it are prudently framed and considerately executed. And accordingly, in this country, in the year 1870, an Act called "The Elementary Education Act, 1870," was passed; and of the general nature of this Act, and of the Acts by which it has been successively amended, we shall give the reader some account in this chapter. But in addition to the scheme, by which a compulsory system of elementary education was by these Acts established, there are other important measures contained in our statute-book connected with the subject of education; and the present chapter shall accordingly be devoted to the discussion—I. Of Public Elementary Education; II. Of Public, and of Endowed, Grammar Schools; III. Of Sites for Poor Schools, and for Literary and Scientific Institutions; IV. Of Parliamentary Grants in Aid of the Education of the Poor; V. Of Pauper Schools; VI. Of Reformatory Schools; and VII. Of Industrial Schools.

I. As to *Public Elementary Education.*—The chief provisions on this subject will be found in the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), the general scheme of which remains unaltered, although in certain points of detail alterations have been effected by the Elementary Education Acts, 1873 (36 & 37 Vict. c. 86); 1876 (39 & 40 Vict. c. 79); 1890 (53 & 54 Vict. c. 22); 1891 (54 & 55 Vict. c. 56); and (as to blind and deaf children) 1893 (56 & 57 Vict. c. 42) (*a*). Under that general scheme, the whole of England is portioned out into *school districts;* and, for each district, there is provided a sufficient amount of accommodation in public elementary schools, available for all the children resident in such district, for whose elementary education efficient and suitable provision is not otherwise made (*b*); and, in general, every borough, and also every parish not included in a borough, forms a school district by itself (*c*)—though two or more adjoining districts may be united together where such union seems expedient; also, the metropolis forms a district of itself (*d*).

When the Education Department of the Privy Council (to whom the general carrying out of the scheme is entrusted) give public notice, that for any school district there is insufficient public school accommodation, and the deficiency is not supplied by private enterprise, there is to be formed for such district a school board (*e*), consisting of not less than five nor more than fifteen members (*f*), to be elected, for the term of three years, *by ballot* (*g*); the electors being, in the case of a borough, the persons on the burgess roll, and in the case of a parish not included in a

(*a*) See also 34 & 35 Vict. c. 94; 35 & 36 Vict. cc. 27, 59; 36 & 37 Vict. c. 49; 37 & 38 Vict. c. 90; 42 & 43 Vict. cc. 6, 48; 43 & 44 Vict. c. 23; 47 & 48 Vict. cc. 43, 70; 48 & 49 Vict. c. 38; and 56 & 57 Vict. c. 51.

(*b*) 33 & 34 Vict. c. 75, s. 5.

(*c*) Sect. 4, and First Schedule.

(*d*) Sects. 40—47.

(*e*) Sect. 6.

(*f*) Sect. 31.

(*g*) 33 & 34 Vict. c. 75, and Second Schedule (Pt. I.); and 36 & 37 Vict. c. 86, ss. 5—9, and Second Schedule.

borough (or in the case of the metropolis), the rate-payers (*h*). And to these school boards is entrusted the working out of the provisions of the Act, but always under the general superintendence and control of the Education Department; and each board is to provide a sufficient number of public elementary schools within its district, each school to be conducted in accordance with the regulations provided by the Act, and of which the principal are the following:—(1.) That it shall not be required, as a condition of any child being admitted to or continuing in a school, that he shall attend (or abstain from attending) any Sunday school or place of public worship, or that he shall attend any religious observance or instruction from which he may be withdrawn by his parents; (2.) That the period during which any religious observance is practised, or instruction in religious subjects given, in the school shall be at prescribed times either at the beginning or at the end of the school hours; (3.) That the school shall at all times be open to the inspection of her Majesty's inspectors of schools, who shall not, however, in the exercise of their duties, inquire into the instruction given to the scholars in religious subjects (*i*); and (4.) That no religious catechism or formulary, which is distinctive of any particular denomination, shall be taught in the school (*k*). And if any school board does or permits any act in contravention of, or fails to comply with, the prescribed regulations, the Education Department may declare such board to be "in default" (*l*); and may thereupon, proceed to appoint fresh members thereof; and on such appointment, the previous members shall be deemed to have vacated their offices, as if they were dead (*m*): and the new members so appointed are to hold office during the pleasure of the Education Department; who, when

(*h*) 33 & 34 Vict. c. 75, s. 29.
(*i*) Ibid. s. 7.
(*k*) Ibid. s. 14; Att.-Gen. *v.* London School Board, Law Rep., 18 Eq. Ca. 608. English, and National Society *v.*
(*l*) Sect. 16.
(*m*) Sect. 63.

they consider that the default has been remedied, and everything necessary for that purpose has been carried into effect, may order that members may be elected again for the school board of the district in the usual way (*n*); or the Education Department may, should they be of opinion that a school board is in default, or that it is not properly performing its duties, order the then members of the board to vacate their seats, and the vacancies to be filled up by a new election (*o*); but in all cases of the Education Department intervening in either of these ways, a report is to be laid before parliament, stating the cases in which, during each year, this power has been exercised, and the reasons for its exercise (*p*).

Among the other provisions of the Elementary Education Acts, we may notice (1) the provision whereby a parent, who, though not a pauper, was unable by reason of poverty to pay his child's school fee, might apply to the guardians of his parish for relief in that respect; and if the guardians were satisfied of his inability, they were to pay the whole or any part of such fee to the extent of threepence a week; and no such payment was to be deemed disqualifying relief (*q*); also, (2) the provision, that a school board might sanction the establishment of a school at which no fees whatever should be required from the scholars,—which last mentioned provision might have been resorted to, where (in the opinion of the school board) such free school was expedient in the interests of education, and the poverty of the inhabitants of the place justified its establishment (*r*); but both these provisions have now been (in effect) superseded, by the Elementary Education Act, 1891, which has made education free, in the case of all schools receiving the "fee grant" of 10*s.* per child provided for by the Act (sects. 1—3); although, in special

(*n*) 33 & 34 Vict. c. 75, s. 63.
(*o*) Sect. 66.
(*p*) Ibid.
(*q*) 39 & 40 Vict. c. 79, s. 10.
(*r*) 33 & 34 Vict. c. 75, s. 26.

cases, a charge not exceeding sixpence per week for each child may still be sanctioned (sect. 4).

And with a view to securing compulsory attendance at schools, every school board—and in a borough, the "local authority," or school attendance committee thereof,—is authorized, with the approval of the Education Department, to make bye-laws for all or any of the following purposes:—(1.) Requiring the parents of children between the ages of five and thirteen to cause such children (unless there is some reasonable excuse) to attend school; (2.) Determining the time during which the children are so to attend school; and (3.) Providing for the remission or payment of the fees, where the parent can establish his inability from poverty to pay same (*s*). But any bye-law under which a child between the age of ten and thirteen is required to attend school, is to provide for the total or partial exemption of such child, if he or she obtain a certificate, from one of her Majesty's inspectors of schools, of having reached the standard of education in that behalf specified in the bye-law (*t*); and no such bye-law is to contravene the provisions of any statute regulating the education of children employed in labour (*u*); and it shall be deemed a reasonable excuse for a child's non-attendance, (1.) If the child is under efficient instruction in some other manner; or (2.) If the child has been prevented from attending by sickness or other unavoidable cause; or (3.) If there is no public elementary school open, within the distance of three miles from the place of residence of such child, or of its parents (*x*).

These provisions for school board attendance have been much strengthened by the Elementary Education Act, 1876 (39 & 40 Vict. c. 79), whereby it is expressly declared, that it shall be the duty of the parent of every child,

(*s*) Sect. 74.
(*t*) Ibid.
(*u*) Ibid.; 36 & 37 Vict. c. 86, ss. 3, 22; 43 & 44 Vict. c. 23.
(*x*) 33 & 34 Vict. c. 75, s. 74.

between the ages of five and *fourteen* years, to cause it "to receive efficient elementary instruction in reading, writing, and arithmetic" (*y*); and that, if this duty in regard to a child above the age of five years is habitually and without "reasonable excuse" neglected, it shall be the duty of the "local authority," after due warning to the parent, to complain to a court of summary jurisdiction (*z*); by whom an "attendance order" may be made, the non-compliance with which may be visited with a pecuniary penalty; and all persons are prohibited, under a penalty, from taking into their employment (subject to certain exceptions) any child, who is under the age of eleven (formerly ten), or who, being above that age but under the age of fourteen, is not *certificated*, or allowed by law to be fully or partially so employed (*a*); also, in the last resort, the child may be sent to a certified industrial school, to the expenses of which the parent will be liable to contribute.

The expenses of the school board are to be defrayed by fees from the scholars (but which fees have now, under the Act of 1891, entirely or almost entirely ceased to be payable); by parliamentary grants (*b*); and by moneys raised by loan (such loans being with the consent of the Education Department) (*c*); and any deficiency is to be raised by a local rate (*d*), to be levied by the rating authority of the district (*e*). Provision has also now been made, by the the Technical Instruction Act, 1889 (*f*), enabling local authorities to supply, or aid in supplying, "*technical*" and "*manual*" instruction in the schools of their district,—the expense thereof being defrayed, in part by a local rate, and

(*y*) 39 & 40 Vict. c. 79, ss. 4, 48.

(*z*) In re Murphy, 2 Q. B. D. 397.

(*a*) 39 & 40 Vict. c. 75, ss. 5, 6, 9; 56 & 57 Vict. c. 61; and see the Agricultural Children Act, 1873 (36 & 37 Vict. c. 67).

(*b*) 39 & 40 Vict. c. 79, s. 19; 54 & 55 Vict. c. 56, s. 1.

(*c*) 33 & 34 Vict. c. 75, ss. 64, 65; 36 & 37 Vict. c. 86, s. 10; 39 & 40 Vict. c. 79, ss. 15, 42; and 42 & 43 Vict. c. 48, s. 3.

(*d*) 33 & 34 Vict. c. 75, s. 53.

(*e*) Ibid. s. 54; 39 & 40 Vict. c. 79, s. 49.

(*f*) 52 & 53 Vict. c. 76; 54 & 55 Vict. cc. 4, 61; 55 & 56 Vict. c. 29.

in part by a parliamentary grant; and for the purposes of the Act, "technical instruction" is defined by the Act (sect. 8), as meaning "instruction in the principles of science and art applicable to industries, and in the application of special branches of science and art to specific industries or employments;" and "*manual instruction*" is defined by the Act, as meaning "instruction in the use of tools, processes of agriculture, and modelling in clay, wood, or other material." And regarding the divers administrative changes introduced (in rural parishes more especially) by the Local Government Act, 1893 (56 & 57 Vict. c. 73), it is to be observed, that none of these changes affect in any way the trusteeship, management, or control of any elementary school (sect. 66).

II. As to *Public and Endowed Grammar Schools.*—In the year 1861, a royal commission issued to inquire into the endowments, and generally into the management, of our "*public schools;*" and in their report, a variety of changes in the government, management, and studies of these schools (or of certain of them, viz., the schools or colleges of Eton, Winchester, Westminster, Charterhouse, Harrow, Rugby, and Shrewsbury), were recommended for adoption; and a temporary Act (27 & 28 Vict. c. 92) having been passed, to prevent the future acquisition of any vested interests by those holding office in the above schools, such as might impede the free action of the legislature, a succession of Acts called the "Public Schools Acts" (*g*) were afterwards passed, to carry into effect the principal changes recommended by the commissioners; and of these Acts, the Public Schools Act, 1868 (31 & 32 Vict. c. 118), is the principal Act. And by the principal Act, it was enacted, that the "governing body" which existed at the date of the Act in any of the above schools, might,

(*g*) 31 & 32 Vict. c. 118; 32 & 33 Vict. c. 58; 34 & 35 Vict. c. 60; 35 & 36 Vict. c. 54; 36 & 37 Vict. c. 41, and c. 62.

within the time prescribed by the Act, proceed to make such statutes as they might deem expedient, for determining and establishing the constitution of the future governing body of such school; but that, after such time had expired, all the powers of making statutes with that object should pass to certain "special commissioners" provided for by the Act (*h*); and the new governing body was to have power to make regulations with respect to the number of the boys, the mode in which they were to be boarded and lodged, the payments to be made for their maintenance and education, the course of study, the powers to be committed to the head master, and the like (*i*); and was also to have power to make statutes, with regard to a variety of matters connected with the school (*k*), including the privileges, numbers, and rules for admission of boys on the foundation of the school, or who had rights as to education in the school; regulations as to scholarships, exhibitions, and the like; the conditions of the appointment to ecclesiastical benefices vested in the governing body; the number, position, rank, salaries, and emoluments of the masters; and the disposal of the income of the property of the school. But all such regulations and statutes, to be so made by the new governing body, required to be submitted for the approval of the special commissioners, and of her Majesty in council (*l*); and the Act provided, that (subject to any vested interests) the head master of every public school to which it applied should be appointed by, and should hold his office at the pleasure of, the new governing body; and that all other masters should be appointed by, and should hold their offices at the pleasure of, the head master (*m*).

And with respect to "*endowed grammar schools*," being schools in which Latin and Greek or either of such

(*h*) 31 & 32 Vict. c. 118, s. 5.
(*i*) Sect. 12.
(*k*) Sect. 6.
(*l*) Sect. 9.
(*m*) Sect. 13; Hayman *v.* Governors of Rugby School, Law Rep., 18 Eq. Ca. 28.

languages are taught (exclusive of the schools to which the Public Schools Acts apply), it was enacted, by an Act passed in the year 1840 (3 & 4 Vict. c. 77), for improving and extending such schools, that, whenever any question came under the consideration of a court of equity, concerning the system of education thereafter to be established in any grammar school, or the right of admission into the same, it should be lawful for that court to make decrees or orders, for extending the system of education in the school in question to other useful branches of literature and science, for regulating the right of admission into the school, and for establishing a scheme for the better application of its revenues,—paying due regard nevertheless to the intentions of the founders and benefactors, as well as to other circumstances; and where any special visitor existed, giving him an opportunity to be heard; and, in many other respects, this Act placed the management of such schools under the control of Chancery; and provided that the jurisdiction should be exercised on petition, according to the provisions of the 52 Geo. III. c. 101, with regard to charitable trusts (*n*). And by an Act passed in the year 1860 (23 & 24 Vict. c. 11), the trustees or governors of any endowed school were enabled (subject to a variety of exceptions particularized in the Act) to make orders, for the admission to such school of children whose parents were not in communion with the church or sect to which the endowment belonged. But the relief given by these enactments not being deemed adequate, in the year 1864 a royal commission issued to inquire into the education given in schools of the following classes, that is to say:—1. Grammar and other endowed schools; 2. Proprietary schools; and 3. Private schools; and the report of this commission having been in due course laid before parliament, and a temporary Act (31 & 32 Vict. c. 32) having been passed, with the object of preventing the

(*n*) 3 & 4 Vict. c. 77, s. 21.

acquisition of vested interests pending legislation on the subject, the recommendations of the commissioners have for some time been, and are now being, gradually carried into effect, under the provisions of a group of statutes known as the "Endowed Schools Acts, 1869, 1873 and 1874," being respectively the 32 & 33 Vict. c. 56; 36 & 37 Vict. c. 87; and 37 & 38 Vict. c. 87,—and in the meantime, the temporary Act has been directed, by the 38 & 39 Vict. c. 29, to continue in force, as long as anything remains unexecuted under the Endowed Schools Acts. And in the year 1889, these Acts received an important addition, in the "Welsh Intermediate Education Act, 1889" (52 & 53 Vict. c. 40); by which last mentioned Act, provision has been made, for the regulation and endowment of schools for intermediate and technical education in every county of Wales and in the county of Monmouth,—the schemes therefor being approved by the Charity Commissioners, and the endowment thereof consisting of such of the local educational endowments as may be appropriated in that behalf, augmented by a payment out of the county rates, and by an equivalent payment to be made by the Treasury; and a joint education committee of the county council has been assigned, for the better regulation of all such schools.

Under the provisions of the "Endowed Schools Acts," and as regards the schools comprised within the purposes of these Acts,—but not as regards other schools,—there is committed to the Charity Commissioners(*o*) the duty of preparing, after such examination or public inquiry as they may think necessary, draft schemes framed in order to render any educational endowment more conducive to the advancement of education(*p*); and with this object, these Commissioners may, in such schemes, alter and add to any existing trusts; and make new trusts, directions,

(*o*) 36 & 37 Vict. c. 87; 37 & 38 Vict. c. 87; Att.-Gen. *v.* Christ Church, Oxford, (1894) 3 Ch. 524.

(*p*) 32 & 33 Vict. c. 56, s. 9; In re Meyricke Fund, Law Rep., 7 Ch. App. 500.

and provisions in lieu of those previously existing; and may consolidate or divide any two or more endowments (*q*); and such schemes may also contain provisions for altering the constitution, rights, and powers of the governing body of any educational endowment; and for establishing new governing bodies, corporate or unincorporate; and may remove any governing body, or if it shall be incorporated, may dissolve such corporation (*r*)—it being the duty of the commissioners, in every scheme whereby the privileges or educational advantages of any particular class of persons, or of persons in any particular class of life, shall be abolished or modified, to have due regard to their educational interest (*s*)—and, so far as conveniently may be, to extend the benefit of endowments to girls as well as boys (*t*). And with regard to the subject of religious teaching, in every scheme (except only such as have reference to schools maintained out of the endowment of any cathedral or collegiate church, or the scholars whereof are required by the founder to be instructed according to the doctrines or formularies of some particular church, sect, or denomination), there is to be inserted a provision, that the parent or guardian, or person liable to the child's maintenance, may claim the exemption of any day scholar from attending prayer or religious worship or instruction (*u*); that the religious opinions of any person shall not affect his qualification for being one of the governing body (*x*); and that he shall not be disqualified for being a master, by reason only of his not being (or intending to be) in holy orders (*y*); and every scheme provides for the dismissal, at the pleasure of the governing body, of every teacher and officer in the school to which the scheme relates, including the principal teacher; with or without a power of appeal, in such cases

(*q*) 32 & 33 Vict. c. 56, s. 9.
(*r*) Sects. 9, 10.
(*s*) Sect. 11; 36 & 37 Vict. c. 87, s. 5.
(*t*) 32 & 33 Vict. c. 56, s. 12.
(*u*) Sects. 15, 16.
(*x*) 32 & 33 Vict. c. 56, ss. 17, 19; 36 & 37 Vict. c. 87, s. 6; and In re Hodgson's School, 3 App. Ca. 875.
(*y*) 32 & 33 Vict. c. 56, s. 18.

and under such circumstances as to the commissioners shall seem expedient (*z*).

Any scheme proposed by the commissioners is to be printed and sent to the governing body of the endowment to which it relates, and also to the principal teacher of the school to which it relates; and is also to be circulated in such other way as the commissioners may think proper, in order to give information to all persons interested (*a*): and if any objections to the scheme are made in writing, or any alternative scheme is suggested for consideration, within three months of the publication of the proposed scheme, the commissioners (or an assistant commissioner) may hold an inquiry concerning the subject-matter of the proposed scheme; and may submit an approved scheme to the committee of council on education, by whom it may be either approved or re-framed,—anyone who finds himself aggrieved by the proposed scheme being at liberty to present a petition against it to her Majesty in council (*b*); and the scheme is ultimately laid before parliament for its assent, but which assent is implied, if neither house address the crown on the matter within forty days from the scheme being laid before it (*c*).

III. *Sites for Schools for the Poor*, and *for Literary and Scientific Institutions.*—The Act 4 & 5 Vict. c. 38, which was passed to facilitate the conveyance of "Sites for Schools," and which, with the undernoted Acts amending it (*d*), is popularly cited as the "School Sites Acts," has provided, that any person legally or equitably entitled in fee simple, in fee tail, or for life in possession, to any lands of freehold, copyhold, or customary tenure, and having the beneficial interest therein, may grant by way of gift, sale, or exchange in fee simple, or for term of years, any quantity

(*z*) Sect. 22.

(*a*) Sect. 33.

(*b*) In re Shaftoe's Charity, 3 App. Ca. 872.

(*c*) Sects. 39—41.

(*d*) 7 & 8 Vict. c. 37; 12 & 13 Vict. c. 49; 14 & 15 Vict. c. 24; and 45 & 46 Vict. c. 21.

of such land not exceeding *one acre* as a site for a school to educate poor persons, or for the residence of the master or mistress of such school, or otherwise for the purposes of the education of poor persons in religious and useful knowledge (*e*) ; any such grant, when made by any person entitled for life only, where the person next entitled in remainder in fee simple or in fee tail is legally competent, having the concurrence of such remainderman ; and the grant is in all cases to provide that, upon the land ceasing to be used for the purposes of the grant, it shall revert to the donor (*f*). And the like grant may be made by any corporation, ecclesiastical or lay, sole or aggregate, an ecclesiastical corporation sole below the dignity of a bishop obtaining the consent in writing of the bishop of the diocese ; and the like grant of, or provision for, a school site may be made (by the proper allotment) on any inclosure of a common (*g*). And by the 15 & 16 Vict. c. 49, the provisions of the School Sites Acts are made applicable to such schools or colleges, for the religious or educational training of the sons of yeomen, tradesmen or others, or for the theological training of candidates for holy orders, as are erected or maintained in part by charitable aid, and in part are self-supporting, ecclesiastical corporations (as regards such grants) being restricted to schools or colleges in union with the Established Church ; and by the 33 & 34 Vict. c. 75, the provisions of these Acts were also made applicative to the public elementary schools already treated of in this chapter. Also, by the Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112),—it is provided that the same facilities as are afforded, by the School Sites Acts in respect of schools for poor persons, shall be available in respect of such institutions, subject to the like provisions as are applicable to sites for schools, namely, that any grant, when made by a person seised only for life, shall have the concurrence of

(*e*) 4 & 5 Vict. c. 38, s. 2.
(*f*) Ibid.
(*g*) 8 & 9 Vict. c. 118, s. 34 ; and 20 & 21 Vict. c. 31, s. 13.

the remainderman in fee simple or in fee tail, if legally competent in that behalf; and that the land granted shall revert to the donor, on its ceasing to be used for the purposes of the grant,—except only in the case of a removal of site, when such land may be exchanged or sold for the benefit of the institution. The Act contains also a variety of other provisions with reference to these institutions, relating chiefly to the persons by and to whom, and the manner in which, conveyances of these sites may be made, and as to the form of such conveyances; to the subsequent sale or exchange of the land conveyed; to the liability of the grantees to rates, taxes, and other charges and expenses; to the manner in which the personal property of the institution shall be vested; to the manner in which actions by or against the institution may be brought, and in which judgment therein shall be satisfied; to the power of making bye-laws, to be enforceable in the county court of the district; to the liability of individual members to be sued or prosecuted in matters affecting the property of the institution; and to the manner in which the institution may effect an alteration, extension, or abridgment of the purposes for which it was established, or may effect its own dissolution, or the adjustment of its affairs. And all the provisions herein stated for the acquisition of school sites and the like, are additional to the provisions of a like nature contained in the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 6, whereby land may be conveyed by deed (to any extent) and by will (to the extent of twenty acres for a public park, two acres for a public museum, and one acre for a schoolhouse), the deed or will being executed twelve calendar months before the death of the donor, and being enrolled in the books of the Charity Commissioners within six months after the date as from which the gift operates (*h*). Also, under the Techni-

(*h*) See also Working Classes Dwellings Act, 1890 (53 & 54 Vict. c. 16),—regarding sites in populous places.

cal and Industrial Institutions Act, 1892 (55 & 56 Vict. c. 29), s. 7, sites for such institutions may, to an extent not exceeding two acres, be freely granted by limited owners,—but only with the consent of the next remainderman, or else with the sanction of the Court; and every such grant is to be forthwith enrolled with the Charity Commissioners (sect. 10).

IV. *Parliamentary Grants for the Education of the Poor.* —By the statute 7 & 8 Vict. c. 37—after reciting that, during several years past, divers sums of money had been granted by parliament to her Majesty, to be applied for the purpose of promoting the education of the poor in Great Britain, and that similar grants might thereafter be made,—it was provided, that where any such grant had been or should thereafter be made in aid of the purchase of the site, or of the erection enlargement furnishing or repair of a school, or in respect of the residence of the master or mistress thereof, upon terms and conditions providing for the inspection of the school by an inspector appointed by her Majesty, such terms and conditions should be obligatory on the trustees and managers of the school, in like manner as if they had been inserted in the conveyance of the site of the school, or in the declaration of the trusts thereof: provided that such terms and conditions were set forth in some document signed by the trustees, or by the major part of them, or (in the case of a voluntary gift) by the party conveying the site. And by 18 & 19 Vict. c. 131, in order that greater security might be afforded for the due application of money advanced to the trustees or managers of schools out of parliamentary grants for any of the above purposes,—it was provided, that where any such grant should be made, no subsequent sale, exchange, or mortgage of the premises should be valid, unless either the written consent of a secretary of state should be given to the same, or else the amount of the grant was repaid; but the Act did not apply to any

school, in respect of grants made *previously* to the statute without any such condition imposed. And under the Elementary Education Act, 1870,—by which (as we have seen) the School Sites Acts were made applicable to public elementary schools (sect. 20),—school boards (sect. 20) and school managers (sect. 21) are enabled to acquire by purchase (by agreement with the owners thereof) the necessary lands and buildings for schools; and (with the sanction of the Education Department) may even compulsorily acquire such lands and buildings; and (by sect. 23) school managers may transfer their school-houses to school boards; and parliamentary grants in aid of the building or enlargement of schools may, in a proper case, be obtained on memorial to the Education Department (sect. 96). And (by sect. 22) the sale, leasing, and exchange of school lands and school buildings, not required by the school board or by the school managers, may be effected, with the sanction of the Education Department, equally as if they were charity lands subject to the Charitable Trusts Acts before mentioned,—the Education Department being (for this purpose) substituted for the Charity Commissioners; and (by sect. 57, as amended by sect. 10 of the 36 & 37 Vict. c. 86) the purchase-money or other expenses payable for acquiring land for a school, and for building a school-house or of otherwise providing or enlarging a school, may (with the sanction of the Education Department) be raised by way of loan; and by an express provision of the Elementary Education Act, 1870, no parliamentary grant in aid of building, enlarging, improving, or fitting up any elementary school is to be made except in pursuance of such memorial as before referred to (*i*); nor is any parliamentary grant to be made to any elementary school which is not a "public elementary school" within the meaning of the Act; but whether the school is or is not provided by a school board

(*i*) 33 & 34 Vict. c. 75, s. 96; 39 & 40 Vict. c. 79, s. 20.

is of no consequence, as regards obtaining the grant, so long as it is a public elementary school (*k*).

V. *Pauper Schools.*—Under the provisions of the 7 & 8 Vict. c. 101, s. 40 (as amended by 11 & 12 Vict. c. 82; 13 & 14 Vict. c. 101; and 31 & 32 Vict. c. 122), parishes and unions may be combined into *school districts*, for the instruction of such of their chargeable infant poor (not being above the age of sixteen) as are orphans; or deserted by their parents; or whose parents or guardians consent to their being placed in such district schools; and by sect. 42, a board of managers, consisting of members chosen from the rate-payers of the district, is constituted for every such district school; and by sect. 43, the board of managers, with the consent of the bishop of the diocese, appoints at least one chaplain of the Established Church to superintend the religious instruction of the scholars, any scholars not belonging to that church, whose parents or next of kin desire it, being visited and instructed in religion by a minister of the particular sect or persuasion to which they may belong; and an inspector of schools visits such district schools, and examines into the proficiency of the children therein, as in the case of public elementary schools. And the 25 & 26 Vict. c. 43 enables the guardians of any parish or union to send any poor child, (being an orphan or deserted, or else with the consent of his or her parents,) to any school certified as fit for the purpose, (not being a reformatory school or a school conducted on principles contrary to the particular religious sect or persuasion to which the child may belong,) and although such school may be supported wholly or in part by voluntary subscriptions, provided the school manager is willing to receive the child; and also authorizes them to pay the expenses incurred for the maintenance, clothing,

(*k*) 33 & 34 Vict. c. 75, s. 97.

and education of the child at such school, out of the funds in their possession—to the extent, at least, of what the child's maintenance in the workhouse would have cost them during the same period; and by 36 & 37 Vict. c. 86, s. 3, repealing the previous Act (18 & 19 Vict. c. 34), commonly called Denison's Act, on the same subject, it was provided, that where *out-door relief* was given to the parent of any child, or to any child, between five and thirteen years of age, elementary education in reading, writing, and arithmetic in some public elementary school should be provided for the child thereout (or out of such further relief as should be necessary for that purpose, such further relief being supplied by the guardians out of the poor law funds in their hands); and the county councils established under the Local Government Act, 1888 (*l*), were required, by section 24 of that Act, to make certain payments to the guardians for this purpose. The provisions lastly stated do not appear to be materially affected, by the Local Government Act, 1893 (56 & 57 Vict. c. 73), as regards the rural parishes to which that Act extends; nor to be affected by the 56 & 57 Vict. c. 42 (relative to deaf and blind children), the last-mentioned Act not extending to workhouse children, or to children boarded out by the poor law guardians, although it does extend to other pauper children (sections 2, 13). Clearly, however, the free education now provided by the Elementary Education Act, 1891, before referred to, does, or ought to, apply to all pauper children; and does, or ought to, operate in relief of the parish or other poor law union accordingly.

VI. *Reformatory Schools.*—Under the statute 29 & 30 Vict. c. 117, which repeals certain earlier Acts on the same subject (*m*), and has in its turn been amended by the 54 & 55 Vict. c. 23, and 56 & 57 Vict. c. 48, the Secretary for the

(*l*) 51 & 52 Vict. c. 41.

(*m*) 1 & 2 Vict. c. 82, s. 11; 17 & 18 Vict. c. 86; 19 & 20 Vict. c. 109; and 20 & 21 Vict. c. 55.

Home Department, upon application made to him by the managers of any "reformatory school," being a school established for the better training of youthful offenders, is empowered to direct an inspector of prisons (styled the inspector of reformatory schools) to examine into the condition and regulations of such school; and (in case the inspector reports in its favour) the school may be certified as being fit for the reception of such offenders (*n*). And any court, magistrate, or justice before whom a person, under the age of *sixteen*, is convicted, and sentenced to receive punishment to the extent of ten days' imprisonment at the least, may direct that, at the expiration of such period of confinement, the offender shall be sent to some such certified reformatory school (selecting, where possible, one conducted according to the religious persuasion, if any, to which the offender may belong), for a further period of not less than two nor more than five years (*o*); or (if the offender appears to be of the age of twelve) for a period of not less than three nor more than five years (*p*); but if the offender is under the age of *ten*, then, in order that he may be so dealt with, the sentence must be at the assizes or quarter sessions; or, else, the child must have been previously charged with some crime punishable with penal servitude or imprisonment (*q*). The home secretary may also at any time order the particular offender to be discharged from the school to which he has been sent; or may direct the removal of any scholar from one school to another (*r*). All the expenses incident to this treatment of juvenile offenders are to be defrayed, to the extent of five shillings per week, by the parent or other person liable for the maintenance of the child (if he or she is of sufficient ability) (*s*); but the commissioners of the treasury may contribute, out of money in that behalf provided by parliament, such sum as the home secretary may recommend, towards the expenses of any certified

(*n*) 29 & 30 Vict. c. 117, s. 4.
(*o*) Sect. 14.
(*p*) 56 & 57 Vict. c. 48.
(*q*) 29 & 30 Vict. c. 117, s. 14.
(*r*) Sect. 17.
(*s*) Sect. 25.

reformatory school (*t*); and the prison authorities may also contribute towards these expenses, but subject in general to the previous approval of the home secretary (*u*). The establishment and maintenance of, and the contribution to, reformatory schools is, however, now made part of the business transferred by the Local Government Act, 1888 (*x*), s. 3, to the county councils created by that Act.

VII. *Industrial Schools.*—Under the statute 29 & 30 Vict. c. 118, which repeals the earlier Act (namely, the Industrial Schools Act, 1861, 24 & 25 Vict. c. 113), on the same subject, the Secretary for the Home Department, upon the application of the managers of any "industrial school," is empowered to direct an examination to be made by the inspector of reformatory schools (who is also to be the inspector of industrial schools) into the condition of the industrial school; and may then grant a certificate constituting the same a certified Industrial School within the meaning of the Act (*y*); and to such school the following classes of children may be sent, that is to say, any child (not previously convicted of felony) who, being apparently under the age of *twelve*, is charged before two justices or a stipendiary magistrate with having committed an offence punishable by imprisonment, or with some less punishment; also, any child who, being apparently under the age of *fourteen*, is brought before such justices or stipendiary as having been found begging or receiving alms, or as having been found in any street or public place for such purpose; or as having been found wandering without any home or settled place of abode, or proper guardianship, or visible means of subsistence; or as having been found destitute (either being an orphan, or having a surviving parent who is undergoing

(*t*) Sect. 24.

(*u*) Sect. 28; 28 & 29 Vict. c. 126, s. 5.

(*x*) 51 & 52 Vict. c. 41, ss. 3, 38.

(*y*) 29 & 30 Vict. c. 118, s. 7.

penal servitude or imprisonment), or found frequenting the company of reputed thieves; also, any child whose parent, step-parent, or guardian represents to such justices or stipendiary that the child is not amenable to his control, and that he desires him to be sent to such a school (*z*); also, any child whose mother has been convicted of a crime (a previous conviction for crime having been proved against her), and who, being under her care and control at the time of her conviction for the last of such crimes, has no visible means of subsistence or is without proper guardianship (*a*). A child so circumstanced may, after full inquiry made into the facts of the case by the justices, be sent, for such period as may seem necessary for his education and training, to any certified industrial school, the managers of which shall be willing to receive him (*b*); but not so as to extend the period of detention beyond the time when the child shall attain the age of sixteen; beyond which age he cannot be detained except with his own consent in writing (*c*). But the Act requires that, if possible, a school shall be selected which is conducted in accordance with the religious persuasion to which the parent may belong; and a minister of such persuasion may visit the child and instruct him in religion (*d*). The parent, or other person legally liable, may be ordered to pay a weekly sum, not exceeding five shillings, for the expenses of the child's maintenance and training at the school (*e*); and on the recommendation of the home secretary, funds for the custody and maintenance of children detained in certificated industrial schools, may be contributed, by the treasury, out of moneys in that behalf provided by parliament (*f*); and poor law guardians, prison authorities, and school boards, may, with the approval of the home

(*z*) 29 & 30 Vict. c. 118, ss. 14—16.

(*a*) 34 & 35 Vict. c. 112, s. 14.

(*b*) 29 & 30 Vict. c. 118, s. 27; 39 & 40 Vict. c. 79, s. 14.

(*c*) 29 & 30 Vict. c. 118, ss. 18, 41.

(*d*) Sect. 25.

(*e*) Sects. 39, 40.

(*f*) Sect. 35.

secretary, contribute to these expenses (*g*). Instead of sending the child to an industrial school, the justices may now commit his custody to some relative, under the Prevention of Cruelty to Children Acts, 1889 and 1894 (*h*). And here it may be added, that under certain provisions of the like character contained in the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), certain other juvenile offenders may be sent to industrial schools,—as will be more particularly mentioned in the Sixth Book of these Commentaries, when we come to deal with crime, and its prevention. Moreover, a school board under the Elementary Education Acts may, with the sanction of a secretary of state, establish and maintain an industrial school, or (in a proper case) a *day* industrial school (*i*); and a child whose parent has disobeyed an "attendance order" made under the Elementary Education Act, 1876 (*k*), may be sent to such industrial school. The establishment and maintenance of, and the contribution to industrial schools is, however, now made part of the business transferred by the Local Government Act, 1888 (*l*), s. 3, to the county councils created by that Act.

(*g*) Sects. 12, 37; 33 & 34 Vict. c. 75, s. 27; 36 & 37 Vict. c. 86, s. 14.

(*h*) 52 & 53 Vict. c. 44, s. 5; 57 & 58 Vict. c. 41.

(*i*) 42 & 43 Vict. c. 48; 43 & 44 Vict. c. 15.

(*k*) 39 & 40 Vict. c. 79, ss. 11, 14, 16; 43 & 44 Vict. c. 23.

(*l*) 51 & 52 Vict. c. 41, ss. 3, 38.

CHAPTER V.

OF THE LAWS RELATING TO LUNATIC ASYLUMS, AND THEIR MANAGEMENT.

We have had occasion elsewhere to explain the general state of the law with reference to idiots and lunatics (*a*); we now proceed to consider some of the more specific provisions made by the legislature for the reception, detention, and care of idiots and lunatics, in lunatic asylums or other like institutions.

Houses established for the reception of insane persons are of various descriptions: some being established and maintained for the public benefit and at the public expense; others (*e.g.*, the Royal Hospital of Bethlehem) (*b*), having been established by, and being maintained by means of, the endowments of charitable donors; and others, again, being private houses kept by individuals for their own profit: but every such house or asylum, of whatever kind or class, is subject to the provisions regarding lunatics made in that behalf by the legislature. And we propose accordingly in the present chapter to treat, I. Of county and borough lunatic asylums; II. Of criminal lunatics; and, III. Of the treatment of lunatics in general (including idiots); but it does not fall to us here to consider the case of habitual drunkards, or (in connection

(*a*) Vide sup. vol. I. p. 446; vol. II. pp. 500—505.

(*b*) 5 & 6 Vict. c. 22; 16 & 17 Vict. c. 96, s. 35; 25 & 26 Vict. c. 104, s. 5.

with them) the provisions of the Inebriates' Acts, 1879 and 1888 (42 & 43 Vict. c. 19, and 51 & 52 Vict. c. 19); under which, for these afflicted persons, retreats may be established, with the sanction of the local authorities; in which retreats, drunkards, dipsomaniacs, and the like may be received (being willing to be received therein), and may therein recover their ordinary state of health, and (with it) a proper sobriety of conduct and of indulgence; and, under the 57 & 58 Vict. c. 41, any inebriate parent or quasi-parent of a child whom he ill-treats or cruelly assaults may be sent to a retreat, instead of being otherwise punished as by that Act is appointed for cruelty to children.

I. County lunatic asylums were first established by 48 Geo. III. c. 96; but the regulations regarding county (and also borough) lunatic asylums which were latterly in force were contained in the Lunatic Asylums Act, 1853 (16 & 17 Vict. c. 97), as amended by the 18 & 19 Vict. c. 105, 19 & 20 Vict. c. 87, 25 & 26 Vict. c. 111, 26 & 27 Vict. c. 110, and 48 & 49 Vict. c. 52; but (as from the 1st day of May, 1890) all the last-mentioned Acts, together with the Lunacy Acts Amendment Act, 1889 (52 & 53 Vict. c. 41), have been repealed, and their provisions (with amendments) consolidated, in and by the Lunacy Act, 1890 (53 Vict. c. 5) (*c*), which last-mentioned Act has also in its turn been amended (but only in some few particulars) by the Lunacy Act, 1891 (54 & 55 Vict. c. 65). By the provisions of the earlier Lunacy Acts, it was made incumbent on the justices of every county, to provide a sufficient asylum for its pauper lunatics, either separately or in union with such other parties as in the Acts men-

(*c*) The provisions applicable to county lunatic asylums are applicable also, *mutatis mutandis*, to lunatic asylums established in *boroughs;* also, the boroughs may, and in certain cases must, unite with the county in which they are situate, in the establishment and maintenance of an asylum. (16 & 17 Vict. c. 97, ss. 3, 9; 19 & 20 Vict. c. 87; 28 & 29 Vict. c. 80; 51 & 52 Vict. c. 41, ss. 3, 32, 36, 86.)

tioned in that behalf (*d*); the expenses of such an asylum being defrayed out of the county rates (*e*), and the management of them being vested in a *committee of visitors*, elected yearly by the justices, or (in case of union with some other asylum supported by voluntary subscriptions) partly by the justices and partly by the subscribers (*f*). The provision, enlargement, maintenance, management, and visitation of such asylums is part of the business which by the Local Government Act, 1888 (*g*), s. 3, has been transferred to the administrative councils created by that Act; and such councils are constituted the "local authority" (*h*) charged, by the Lunacy Act, 1890, with the provision and maintenance of county and borough asylums (*i*).

These lunatic asylums (otherwise called pauper lunatic asylums) are supplementary, in a sense, to the administration of the poor law; and they became necessary after the provision of the Poor Law Amendment Act, (4 & 5 Will. IV. c. 76,) s. 45, whereby it was made penal to confine any insane person, having dangerous tendencies, for more than fourteen days, in any workhouse; and it was expressly provided, by the 25 & 26 Vict. c. 111, s. 20, that no lunatic whatever should be detained in the workhouse for more than that period, unless under a certificate from the proper medical officer; and under the 53 Vict. c. 5, s. 24, a justice's order was in such cases necessary, for the lunatic's longer detention there; but under the 54 & 55 Vict. c. 65, s. 4, this order is no longer required; also (by 53 Vict. c. 5, s. 25), pauper lunatics discharged from asylums, hospitals or licensed houses, may, in proper cases, be detained as lunatics in workhouses for indefinite periods.

The provisions of the earlier Acts for the reception of pauper lunatics into asylums were briefly as follows:—Any relieving officer of a parish within a union, or under a

(*d*) 16 & 17 Vict. c. 97, s. 3.
(*e*) Sect. 46.
(*f*) Sect. 22.
(*g*) 51 & 52 Vict. 41.
(*h*) 53 Vict. c. 5, s. 239.
(*i*) Ibid. s. 238.

board of guardians,—and every overseer of a parish where there was no relieving officer,—who had knowledge (by notice from the medical officer or otherwise) that any pauper resident in such parish was deemed to be a lunatic, might give notice thereof to some justice of the county, who thereupon made an order for the pauper to be brought before him or before some other justice of the county; and the justice before whom the pauper was brought called to his assistance a physician, surgeon, or apothecary; and if, upon examination of the pauper, the medical man signed a certificate, to the effect that the pauper was a lunatic and a proper person to be taken charge of,—the justice, if satisfied, upon view or other proof, that such was indeed the fact, made an order, directing the pauper to be received into the asylum of that county (*k*); or, under special circumstances, into some other asylum, or into a hospital or house for lunatics (*l*), such hospital or house being a duly registered hospital or a duly licensed house (*m*). Furthermore, any justice, acting upon his own knowledge, and without any notice as above, might examine any pauper deemed to be a lunatic, at his own abode or elsewhere; and, after such examination, might proceed in all respects as if the pauper had been brought before him in the more formal way (*n*). Also, if a pauper deemed to be a lunatic could not, on account of his health or other cause, be conveniently taken before any *justice* for examination, he might have been examined at his own abode or elsewhere, by some clergyman officiating in the parish, in company with the relieving officer (or overseer); and in such case, the order for his reception into an asylum might have been made, conjointly, by such clergyman and relieving officer or overseer (*o*); but as regards pauper lunatics so circumstanced, they may no longer apparently be received into

(*k*) 16 & 17 Vict. c. 97, s. 67; 25 & 26 Vict. c. 111, ss. 19—28.

(*l*) 16 & 17 Vict. c. 97, s. 67.

(*m*) 8 & 9 Vict. c. 100, ss. 14—17, 43.

(*n*) 16 & 17 Vict. c. 97, s. 67.

(*o*) Ibid.

any asylum, hospital, or licensed house under a reception order signed by such officiating clergyman and overseer or relieving officer (*p*), but only on a "reception order" or "summary reception order" of a justice (*q*); or else of the chairman of the board of guardians, if duly authorized by the Lord Chancellor to sign such reception order (*r*): and a justice is now, in no case, to sign such reception order for an alleged pauper lunatic, without first satisfying himself, that the alleged pauper either is in receipt of relief or is in such circumstances as to require relief (*s*).

Besides pauper lunatics, any lunatic (whether resident in the county or not) who, on examination by two justices, (assisted by a medical man,) was found to be *meditating* crime (*t*), might be sent to and detained in the county (or borough) asylum; and now, under the provisions of the 53 Vict. c. 5 (*u*), lunatics (not being pauper lunatics) who are not under proper care or control, or who are cruelly treated or neglected by the person having charge of them, may (on the sworn information of a constable or parish overseer) be personally visited by a justice, who shall authorize and direct two medical practitioners to visit and examine them, and to certify as to their mental condition; and the justices may in a proper case, and on the certificates of such medical practitioners, cause the lunatic to be confined either in a pauper asylum or in a hospital or licensed house, unless the person in charge of the lunatic satisfies the justice that he will take proper care of him; and to the reception order in such cases, the medical certificates are now to be attached (*x*).

The earlier Acts also provided for the admission into the lunatic asylum of any county (or borough), of the pauper lunatics of any other county or borough, or even of lunatics

(*p*) 53 Vict. c. 5, ss. 14, 16, 315.
(*q*) Ibid. s. 13.
(*r*) 54 & 55 Vict. c. 65, s. 25.
(*s*) 53 Vict. c. 5, s. 18.
(*t*) 1 & 2 Vict. c. 14; Whitfield's case, 15 Q. B. D. 122.
(*u*) 52 & 53 Vict. c. 41, s. 13.
(*x*) 54 & 55 Vict. c. 65, s. 5.

who were not paupers (*y*); but as regards lunatics who were not paupers, the visitors might prescribe, as a condition of admission, that the person applying for the admission should give an undertaking to pay for the lodging, maintenance, and other necessaries to be provided for the lunatic in the asylum; and these provisions are maintained in the Lunacy Act, 1890 (*z*).

As regards pauper lunatics, every pauper lunatic is of course chargeable to the poor rates, being the poor rates of the parish from which he is sent, or of other the parish to which he belongs (*a*); or (if the parish forms part of a union) the charge falls on the *common fund* of the union; and in case the pauper's settlement cannot be ascertained, the charge falls upon the county at large in which he is found (*b*). And by the Local Government Act, 1888 (*c*), the administrative councils established under that Act are required to provide (to the extent specified in the Act) for all pauper lunatics, according to their chargeability, partly out of the Exchequer Contribution Account spoken of in a former chapter (*d*), and partly out of the general rates for the administrative county; but under the Lunacy Act, 1890, any property of the lunatic, if more than sufficient for the maintenance of his family, may, by order of a justice (sect. 299), or of a county court judge (sect. 300), be made available to recoup the expenses of his maintenance.

As from the 1st day of May, 1890, fuller and more specific provision has been made, by the Lunacy Act, 1890, already referred to, against the wrongful detention of persons as lunatics, it being enacted by that Act, that as regards lunatics (other than the criminal lunatics hereinafter referred to, and other than pauper lunatics and

(*y*) 16 & 17 Vict. c. 97, s. 43.
(*z*) 53 Vict. c. 5, ss. 269—271.
(*a*) Sects. 286—298; Finch *v.* York Union, 2 Q. B. D. 15.
(*b*) The Queen *v.* Medway Union, Law Rep., 3 Q. B. 383.
(*c*) 51 & 52 Vict. c. 41, ss. 3, 24, 32, 36, 38, and 86.
(*d*) Supra, pp. 45, 46.

lunatics wandering at large, and lunatics so found by inquisition), no person shall, excepting in cases of urgency, be received or detained as a lunatic in any asylum, hospital, or licensed house, or as a single patient, unless under the reception order of a county court judge or magistrate or justice of the peace (*e*); which order is to be obtained on petition accompanied by two medical certificates under the hands of two medical practitioners (sect. 4); and the judge, magistrate, or justice may himself visit the alleged lunatic to satisfy himself as to the lunacy (sect. 6); and the reception order, when made, and when it has the medical certificates attached thereto as before mentioned, is a sufficient authority (within seven clear days from its date) for the petitioner to take the lunatic to, and for his reception and detention in, the place mentioned in the order (sect. 36); also, in cases of urgency, the lunatic may be received and detained under an "urgency order" made by the husband, wife, or other near relative of the lunatic, accompanied by one medical certificate under the hand of one medical practitioner, who has personally examined the lunatic within two days before signing such certificate (sect. 11); but the Act gives the lunatic the right of appealing in certain cases against the order for his reception or detention (sect. 8), such appeal being to another judge, magistrate, or justice. The Act contains also minute provisions for the protection of persons from being wrongfully confined as lunatics by their near relatives by blood or marriage; and, with a view to ascertaining whether or not the detention of persons as lunatics is in the first instance lawful, the Act specially provides, that within one month after the reception of a lunatic the medical superintendent, medical proprietor, or medical attendant, as the case may be, who has him in charge, shall report as to his mental and bodily condition to the Com-

(*e*) Being one of the committee appointed for this purpose by the justices of the county or quarter sessions borough. (Sect. 10).

missioners in Lunacy (sect. 39); and thereupon those Commissioners, or one or more of them, are to visit the lunatic; and the visitors in lunacy are also to visit him if he is detained as a private patient in a licensed house within their district (sect. 29); and thereupon, according to the true state of the alleged lunatic, he may be either discharged from or continued in detention (sect. 39). The Act also provides, that reception orders shall in general continue good for one year only, but may (where necessary) be continued for two years, and be further continued for three years, and be further continued for five years, and afterwards be continued for successive periods of five years (sect. 38); and these orders are now continued and successively continued for the periods aforesaid automatically, that is to say, merely upon the medical officer or medical attendant who has the lunatic in his charge specially reporting to the Commissioners from time to time, as prescribed, that the lunacy still continues (*f*); but the Commissioners may, at any period of the detention of the lunatic, visit him, and if he is detained without sufficient cause, they may order his discharge (sect. 38). Also, any one, whether a relative or not of the alleged lunatic, may obtain an order from the Commissioners for the examination of the lunatic by two medical practitioners authorized by the Commissioners; and on the certificate of such practitioners, the Commissioners may in a proper case order the discharge of the alleged lunatic (sect. 49); and any alleged lunatic (being a pauper lunatic) may, in a proper case, and upon an order of the committee of visitors, be delivered over to his relatives or friends willing to take care of him (sect. 57); and these latter may in such case receive an allowance from the poor law authority towards the cost of his maintenance. The Act also provides, that lunatics detained by persons receiving no payment therefor, or deriving no profit therefrom, or who are detained in charitable or other

(*f*) 54 & 55 Vict. c. 65, s. 7.

like institutions (not being asylums, hospitals, or licensed houses), may be discharged or removed to an asylum, hospital, or licensed house, by order of the Lord Chancellor, upon a report as to their condition transmitted to the Lord Chancellor by the Commissioners (sect. 206). And there are also many other provisions contained in the Act which have for their object the comfort and humane treatment of lunatics during the period of their detention (*g*), including the proper management of asylums, hospitals, and licensed houses, and their enlargement when necessary; and in case a lunatic who is lawfully detained escapes, he may be retaken in England, Scotland, or Ireland, on the warrant of a justice of the peace, to be obtained by any person in that behalf authorized by the Commissioners (sects. 85—89).

II. Criminal Lunatics.—The Criminal Lunatics Act, 1884 (47 & 48 Vict. c. 64), which repeals and consolidates (with amendments) the earlier general Acts upon the subject, and which were called the Criminal Lunatics Acts, 1840 to 1869 (*h*), has enacted, that where it appears to any two members of the visiting committee of a prison that a prisoner in such prison (not being under sentence of death) is insane, they shall call to their assistance two legally qualified medical practitioners, to examine the prisoner and inquire as to his insanity; and after such examination and inquiry, they may certify in writing that the prisoner is insane. As regards any prisoner who is under sentence of death, if it appears to the secretary of state, either by means of a certificate signed by two mem-

(*g*) Female (and not male) attendants are to have the personal charge of female lunatics (sect. 53), unless in cases of urgency; and having carnal intercourse with any such lunatic, whether she consent or not, is an offence punishable with imprisonment, for two years, with or without hard labour. (Sect. 324.)

(*h*) 3 & 4 Vict. c. 54; 27 & 28 Vict. c. 29; 30 & 31 Vict. c. 12; and 32 & 33 Vict. c. 78.

bers of the visiting committee of the prison in which such prisoner is confined, or by any other means, that there is reason to believe such prisoner to be insane, the secretary of state is to appoint two or more legally qualified medical practitioners to examine the prisoner and inquire as to his insanity; and after such examination and inquiry, they report in writing to the secretary of state as to the sanity of the prisoner, and certify or not that he is insane; and in case they certify that he is insane, the secretary of state may thereupon, if he thinks fit, issue his warrant for the removal of such prisoner to the asylum named in the warrant, and the prisoner is to be received into such asylum accordingly; and, subject to the provisions of the Act relating to his conditional discharge and otherwise, he is to be detained therein, or in any other asylum to which he may be transferred in pursuance of the Act, as a criminal lunatic, until he ceases to be a criminal lunatic (*i*). Should the criminal lunatic at any time afterwards be certified to have become sane, he is to be remitted to prison, by warrant of the secretary of state, there to complete his sentence (*k*); but as regards any such criminal lunatic found to have been insane at the date of the commission of the offence, the Trial of Lunatics Act, 1883 (46 & 47 Vict. c. 38), s. 2, has now provided, that, the jury having first returned a special verdict to that effect, the court shall order the accused to be kept in custody as a criminal lunatic, in such place as the court shall direct, during her Majesty's pleasure.

The proper prison for persons removable under the provisions of the Acts relating to criminal lunatics, is some asylum appropriated by law for the custody and care of such criminals as shall become insane during their imprisonment, or of such persons as shall be acquitted at their trial on the ground of insanity, under the 39 & 40

(*i*) 47 & 48 Vict. c. 64, ss. 2, 10; Bradford Union *v.* Wilts, Law Rep., 3 Q. B. 604; Pegge *v.* Lampeter Union, ib. 7 C. P. 366; The Queen *v.* Lewes, ib. 7 Q. B. 579.

(*k*) 47 & 48 Vict. c. 64, s. 3.

Geo. III. c. 94 (*l*); for the Act 23 & 24 Vict. c. 75 (amended by 47 & 48 Vict. c. 64) has enacted, that her Majesty may, from time to time, by warrant under her royal sign manual, appoint that any asylum or place in England which has been provided for the purpose, shall be an *asylum for criminal lunatics;* and that the secretary of state may from time to time appoint a council of supervision thereof, and also a resident medical superintendent, chaplain, and such other officers and servants as he shall think necessary, and shall frame such rules for its guidance and management, as may be required (*m*). The secretary of state may also, at any time, order the discharge of any such criminal prisoner, either absolutely or on conditions; and if the conditions be broken, may cause the prisoner to be recaptured (*n*); and he may also permit any such criminal prisoner to be absent on trial, from his place of confinement, on such conditions as he may think fit. The Act contains also provisions for the contingency of the term of punishment awarded to any criminal, who shall become lunatic, expiring before he recovers the use of his reason (*o*); and also provisions for the care of such criminal lunatics as shall be or become pauper lunatics (*p*).

III. The provisions which have been made to secure the proper treatment of lunatics in general may be stated as follows:—In addition to the provisions of the 53 Vict. c. 5, above stated, regulating their original reception and subsequent detention, and providing against their wrongful confinement and for their humane treatment during their lawful confinement, it has been provided by the same Act, repealing but re-enacting the like provisions contained in the 8 & 9 Vict. c. 100, 16 & 17 Vict. cc. 96, 97, and 25 & 26 Vict. c. 111, that it shall be a *misdemeanor*

(*l*) Vide post, bk. VI.
(*m*) 23 & 24 Vict. c. 75, s. 2.
(*n*) 46 & 47 Vict. c. 64, s. 5.
(*o*) Sect. 6.
(*p*) Sects. 7, 8.

for any person to receive two or more lunatics into any house (not being a county or borough lunatic asylum), which is not either a hospital duly registered, or some house duly licensed for the reception of lunatics (*q*); but *one* lunatic may be so received (*r*). And hospitals wherein lunatics are to be received, must be registered with the sanction of the commissioners of lunacy (a board of persons comprising medical men and barristers, originally established by 8 & 9 Vict. c. 100, s. 3, and which has been continued by the Lunacy Act, 1890, s. 150); and *licences* for keeping houses for such purpose are granted by the same commissioners, at a quarterly or special meeting of the board, for Middlesex, London, Westminster, Southwark, and all places within the range of seven miles from any part of London, Westminster, or Southwark; and, in other places, licences for keeping such houses (the houses having been first inspected by the commissioners) may be granted by the justices in general or quarter sessions assembled (*s*); but the licence is in no case to be for a period exceeding thirteen calendar months, and must therefore be periodically renewed (*t*). The Lunacy Act, 1890, contains also minute and specific provisions, for the effectual superintendence of all such registered hospitals and licensed houses; requiring, *e. g.*, that the keepers of such hospitals and houses shall report the admission, death, removal, discharge, or escape of any patient, and shall provide the patients with proper medical attendance (*u*); also, that all such patients shall be visited by the commissioners, or (in the country) by special visitors appointed by the magistrates (*x*), and that special visits may in particular cases be directed (*y*); and that reports shall be made by the visitors to the commissioners, and by the commissioners to the lord chancellor, of the state of the several houses

(*q*) 53 Vict. c. 5, s. 315.
(*r*) Ibid.
(*s*) Sect. 208, and 3rd Schedule.
(*t*) Sects. 207, 216.
(*u*) Sects. 43—52.
(*x*) Sects. 163—168, 169—176, and 177—182.
(*y*) Sect. 204.

visited by them, and as to the care taken of the patients therein (*z*). Moreover, a person detained in a licensed house or hospital without sufficient cause may be directed by the commissioners to be set at liberty (*a*); but this power does not of course extend to enabling the commissioners to order the discharge of a person found lunatic under a *commission;* or who is in confinement by order of the secretary of state, or under the order of any court of criminal jurisdiction. The commissioners may also visit all *asylums* and *gaols* and *workhouses* where any lunatics are confined, and inquire into the condition, system, and regulations of such asylums, gaols, and workhouses; and in the case of workhouses, they report thereon to the local government board. And generally, the lord chancellor, in the case of lunatics under the care of committees, and either the lord chancellor or the home secretary, in the case of other persons under restraint as lunatics, may direct the commissioners or any special commissioner to visit the lunatic, and to inquire into such matters as are directed by the order, and to report to him the result of the inquiry.

And as regards idiots,—as distinguished from lunatics,—specific provision has also now been made, for their reception in such registered hospitals and licensed houses; the Idiots Act, 1886 (49 Vict. c. 25), having enacted, that idiots under age may be received into, and until they attain twenty-one years of age may be detained in, such places (being first duly registered under the Act), on the certificate in writing of a duly qualified medical practitioner, accompanied with a statement, of the idiot's parent or guardian, certifying as to his general condition and treatment; and such idiots may, with the written consent of the commissioners in lunacy, be retained in such places after they have attained the age of twenty-one years; and idiots who have already attained that age may be received into and detained in

(*z*) Sects. 162, 184. (*a*) Sects. 72—78.

such places, on the like certificate and statement; and for securing their proper treatment while so detained, the provisions in that behalf applicable to lunatics confined in such places, and which have been hereinbefore stated with some detail, are,—that is to say, the like provisions are,—with but few exceptions, applicable also to idiots detained therein,—the provisions of the Idiots Act, 1886, in these particulars not having been affected in any way by the Lunacy Act, 1890 (*b*).

(*b*) 53 Vict. c. 5, s. 340.

CHAPTER VI.

OF THE LAWS RELATING TO PRISONS.

THE subject of gaols or prisons is the next matter demanding our consideration; and it follows somewhat appropriately on the consideration of lunatic asylums.

It is a principle of our law, founded on a due regard to the public liberty and welfare, that a prison may not be erected, save by the authority of parliament (*a*); and when once erected, it belongs to the sovereign (*b*), as representing the executive government of the country. Moreover, the gaoler, governor, keeper, or other chief officer of a prison was formerly, in contemplation of law, considered merely as the deputy of the sheriff of the county or place in which the prison was situate; and consequently, if he negligently suffered a prisoner to escape out of his custody, the sheriff, as his principal, was held responsible; but under the existing law, every prisoner is deemed to be in the legal custody of the gaoler himself, and the sheriff is therefore no longer liable for his escape (*c*).

There is a species of prison which is termed, by way of distinction from a gaol properly so called (or common gaol), a house of correction, or (in the city of London) a bridewell, and sometimes a penitentiary (*d*); and regarding houses of correction, it is to be observed, that they were established in the reign of Elizabeth; and were originally

(*a*) 2 Inst. 705; Bac. Abr. Gaol (A.); R. *v.* Justices of Lancashire, 11 Ad. & Ell. 144.

(*b*) 2 Inst. 589.

(*c*) 28 & 29 Vict. c. 126, s. 58; 40 & 41 Vict. c. 21, s. 31.

(*d*) 28 & 29 Vict. c. 126, s. 4.

designed for the penal confinement (after conviction) of paupers refusing to work, and of other persons falling under the legal description of *vagrants* (*e*); and at first this was the only purpose for which houses of correction might be used, the common gaol having then been the only legal place of commitment for persons convicted of offences or awaiting their trial (*f*). However, by the 5 & 6 Will. IV. c. 38, ss. 3, 4, it was enacted, that either a justice of the peace, or a coroner, might, as regards prisoners awaiting their trial, commit them for safe custody, to any house of correction situate near the place where the assizes or sessions were to be held, at which they were to be tried; and subsequently "police stations" and "lock-up" houses were successively established, for the temporary detention of persons charged with offences (*g*); it being, however, provided, by the 14 & 15 Vict. c. 55, ss. 20, 21, that every prisoner committed in the first instance otherwise than to the common gaol should be, in due course, removed to the common gaol to take his trial. The importance of the distinction between gaols and houses of correction has, however, now been in a great measure done away with by the Prison Act, 1865 (28 & 29 Vict. c. 126), which enacts that (subject to the provisions of that Act with respect to the appropriation of prisons to different classes of prisoners) every prison to which the Act applies shall be deemed to be both a gaol and a house of correction (*h*); and the Prison Act, 1877 (40 & 41 Vict. c. 21) gives the secretary of state a general authority to appoint the particular prisons in which prisoners shall be confined, both before and during their trial, and after conviction (*i*); moreover, prisoners may be removed from one prison to another, for the purposes of their trial (*k*).

(*e*) 39 Eliz. c. 4.

(*f*) 5 Hen. 4, c. 10; 23 Hen. 8, c. 2; 6 Geo. 1, c. 19.

(*g*) 5 & 6 Vict. c. 109; 11 & 12 Vict. c. 101; 13 & 14 Vict. c. 20; 28 & 29 Vict. c. 126; 31 & 32 Vict. c. 22.

(*h*) 28 & 29 Vict. c. 126, s. 56.

(*i*) 40 & 41 Vict. c. 21, ss. 24, 25.

(*k*) 29 & 30 Vict. c. 100.

The maintenance and government of prisons is now mainly provided for by the Prison Acts 1865 and 1877, just referred to, and by the Prison Act, 1884 (47 & 48 Vict. c. 51), by which three Acts the statute law on this subject has been consolidated and amended; and by the Prison Act, 1865, every place having a separate prison jurisdiction (*i.e.*, speaking roughly, every county, riding, hundred, liberty, borough, or town) is placed under the legal liability of providing, at its own expense, adequate accommodation for its own prisoners; and the duty of seeing that this result is attained is entrusted to the *prison authority*, that is to say, to the justices of the county, the council of the borough, or otherwise, as the case may be (*l*); and appears to be now vested in the county council created by the Local Government Act, 1888 (*m*). And the Prison Act of 1865 (as amended by the subsequent Prison Acts) makes careful provision for the spiritual wants of the prisoners during the period of their incarceration, enacting that there shall be appointed a chaplain and (if thought necessary) an assistant chaplain for each prison, being respectively clergymen of the Established Church, and duly licensed in that behalf by the bishop (*n*); and either a chapel, or a room suitable for the purposes of a chapel, is to be provided in every prison, in which prayers (selected from the liturgy of the Established Church) and portions from the Scriptures may be read daily, either by the chaplain himself, or by the gaoler, or by some other person selected for the purpose (*o*); and to meet the spiritual wants of such prisoners as do not belong to the Established Church, a minister of the persuasion to which such prisoners belong may be appointed, and a reasonable recompense awarded

(*l*) 28 & 29 Vict. c. 126, s. 5. A place has a "separate prison jurisdiction" which either in fact maintains, or (but for other accommodation being provided for it) would be liable at law to maintain, a separate prison for itself. (Sect. 9.)

(*m*) 51 & 52 Vict. c. 41, s. 3.

(*n*) 28 & 29 Vict. c. 126, ss. 10, 13.

(*o*) Sched. I., Nos. 44, 45.

to him for his services (*p*); and the prisoners are required to attend at the celebration of divine service, and such of them as desire it may receive religious and moral instruction. And as regards generally the management of prisons, and their maintenance, and the discipline to be exercised by the prison officials over the prisoners, very exact and minute provisions have been laid down in the Prison Acts, more particularly in the Prison Acts, 1865 and 1877; and by the latter of these two Acts, it has been specifically enacted, that, for the future, all expenses incurred in the maintenance of those prisons to which the Act applies (that is to say, all prisons which belong to any "prison authority" as defined by the Act of 1865), as well as the expense of keeping the prisoners therein, shall be defrayed out of moneys to be provided by parliament, instead of as theretofore by local rates; and that the continuance or discontinuance of any particular prison or prisons, the appointment of all prison officers, the control and safe custody of the prisoners, and all powers and jurisdictions exerciseable by prison authorities, or by the justices in sessions assembled, in relation to prisons within their jurisdiction, shall be entrusted and transferred to the secretary of state (*q*). And to assist the secretary of state in the due execution of this part of his office, the Act has established a Board of Prison Commissioners, in whom (subject to his control) the general superintendence of all prisons under the Act is vested; and such Commissioners are to be assisted by inspectors and other officers (*r*); and the Commissioners, either by themselves or by their officers, are to visit and inspect the different prisons; and are to examine into the state of the buildings, the conduct of the officers, the treatment and conduct of the prisoners, their labour and earnings, and similar matters, including an

(*p*) Sched. I., No. 47; Sched. III.

(*q*) 40 & 41 Vict. c. 21, ss. 4, 5; Mullins *v.* Treasurer of Surrey, 6 Q. B. D. 156.

(*r*) 40 & 41 Vict. c. 21, ss. 6, 7.

inquiry into all alleged abuses; and to these commissioners are also transferred the specific powers and jurisdictions conferred upon "visiting justices" either at common law or by charter or statute; and they are to make from time to time reports as to each prison to the secretary of state; and their annual report is to be laid before both houses of parliament (*s*). And under the Prison Act, 1884, the secretary of state may, with the approval of the Treasury, alter, enlarge, or rebuild any prison; or build any new prison; or appropriate for a new prison any building or part thereof vested in him (*t*); and thereupon may declare such new prison to be a prison under the Prison Acts, and to be within the jurisdiction of the prison commissioners, and to be a prison for the county, or other the prison jurisdiction, named in the declaration.

Besides the prisons to which the Prison Acts apply, and besides military and naval prisons (*u*), there are some particular prisons, which may here be noticed,—as being or having been the subjects of separate statutory regulation, that is to say:—

1. *Millbank Prison.*—This prison was formerly called "The Penitentiary at Millbank," and was used for the temporary reception of convicts (male and female) under sentence of penal servitude, including occasionally military offenders (*x*); and although locally situated within their jurisdiction, the justices for Middlesex or Westminster had no authority over it (*y*). By the 13 & 14 Vict. c. 39, this prison was placed under a board of three persons, appointed by the secretary of state,—and established as a

(*s*) 40 & 41 Vict. c. 21, s. 10. The "visiting justices" appointed by the Prison Act, 1865, are now represented by the "visiting committee of justices;" and the visiting committee exercise such duties as are from time to time prescribed by the secretary of state. (40 & 41 Vict. c. 21, ss. 13—15.)

(*t*) Sect. 2.

(*u*) 28 & 29 Vict. c. 26, s. 3.

(*x*) 6 & 7 Vict. c. 26; 11 & 12 Vict. c. 104; 13 & 14 Vict. c. 39; 32 & 33 Vict. c. 95; all now repealed by 55 Vict. c. 1.

(*y*) 6 & 7 Vict. c. 26, s. 8.

body corporate, by the name of "The Directors of Convict Prisons" (*z*); and they (with his approbation) used to make regulations for the government of the prison, and yearly reported to him as to all matters relating to the prison or to the convicts; and their reports were laid before both houses of parliament (*a*); and the secretary of state also appointed for the prison, a governor, a chaplain, a medical officer, a matron, and such other officers as he deemed necessary (*b*). But the prison at Millbank has now ceased to be used as a prison; and the site thereof having belonged to the crown, it has, by the 55 Vict. c. 1, been transferred to her Majesty's Commissioners of Works (*c*); and by them, has been duly appropriated—in part for the erection of artizans' dwellings, and in part for other public purposes.

2. *Parkhurst Prison.*—This prison was established for the confinement and correction of *young* offenders (male or female) as well those under sentence of penal servitude, as also those under sentence of imprisonment (*d*). The regulations for this prison (which is in the Isle of Wight) are

(*z*) These directors still superintend, visit, and report upon such other prisons, used for the confinement of offenders under sentence of penal servitude, as by Order in Council in that behalf appointed; and these now include the prisons at Pentonville, Borstal, Brixton, Chatham, Dartmoor, Parkhurst, Portland, Portsmouth, Woking, Fulham, and Wormwood Scrubs. (5 Geo. 4, c. 84, s. 10; 13 & 14 Vict. c. 39; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3; 39 & 40 Vict. c. 42.)

(*a*) 6 & 7 Vict. c. 26, ss. 10, 11; 13 & 14 Vict. c. 39, s. 1.

(*b*) 6 & 7 Vict. c. 26, s. 5.

(*c*) The 48 & 49 Vict. c. 72, provides, that on the removal from their present sites of Millbank Penitentiary or Pentonville Penitentiary, the Queen may, on the recommendation of the Treasury,—and that, on the removal from its present site of Coldbath Fields Prison, or of the Clerkenwell House of Detention, the justices of the peace for the county of Middlesex may,—sell and convey those respective sites, or any part or parts thereof, to the Metropolitan Board of Works, at a "fair market price,"—the object being to furnish sites for the construction of convenient artizans' dwellings.

(*d*) 1 & 2 Vict. c. 82; 5 & 6 Vict. c. 98, s. 12; 20 & 21 Vict. c. 3, s. 3.

made under the sanction of the secretary of state, and are laid before parliament; and they may include the power to inflict corporal punishment on all male offenders who are therein confined for misconduct while in prison. The secretary of state appoints a governor, chaplain, surgeon, and matron, and all other necessary officers. This establishment also is placed, by 13 & 14 Vict. c. 39, under the superintendence of the "Directors of Convict Prisons;" who, if they discover any abuses, are to report the same to the secretary of state; and they are required, also, to report to him as to the state and condition of the prison; and such report is submitted to parliament (*e*).

3. *Pentonville Prison.*—This prison was established originally for the temporary confinement of male convicts under sentence of penal servitude (*f*); but it is now used as an ordinary prison. This prison also is placed, by 13 & 14 Vict. c. 39, under the superintendence of the "Directors of Convict Prisons;" and power is conferred on these directors, with the approbation of the secretary of state, to make rules to be observed therein (*g*), and to appoint officers,—comprising a governor, a chaplain, a medical officer, and such other officers as may be found necessary (*h*). And the directors are from time to time to appoint one or more of themselves to visit the prison during the intervals between their meetings; and they may delegate to such visitor or visitors the power of making orders in cases of pressing emergency (*i*); and the directors report to the secretary of state as to all matters relating to the prison, its discipline and management; and such reports are laid before parliament (*k*).

(*e*) 1 & 2 Vict. c. 82; 13 & 14 Vict. c. 39.

(*f*) 5 & 6 Vict. c. 29, ss. 14, 16; 16 & 17 Vict. c. 99, s. 6; 20 & 21 Vict. c. 3, s. 3.

(*g*) 5 & 6 Vict. c. 29, s. 9.

(*h*) Sect. 6.

(*i*) Sect. 10.

(*k*) Sect. 13.

CHAPTER VII.

OF THE LAWS RELATING TO HIGHWAYS—AND HEREIN OF BRIDGES AND TURNPIKE ROADS.

HIGHWAYS are those public roads which all the subjects of the realm have a right to use. The soil of such roads (equally as in the case of private roads) is, by presumption of law, in the adjoining owner on either side of the road, *usque ad medium filum viæ* (*a*); but the presumption may of course be rebutted (*b*). The term highway includes also (but for some purposes only) those roads or ways, *e. g.*, church paths, which are common to the inhabitants of some particular parish or district only (*c*); and a road may be a public road or highway, although it should not be a thoroughfare (*d*). The highways or public roads, now in use throughout the country, have in general either existed by prescription (that is, from time immemorial), or have been constructed under the authority of local Acts of Parliament; in some cases, however, they appear to have originated in the dedication of the owner of the soil over which they pass; for such owner may, if he think fit, *expressly* dedicate a way over his land to the use of the public; and if he permit strangers for a long period to pass over it, at their free will and pleasure, and without

(*a*) Berridge *v.* Ward, 10 C. B. (N. S.) 400; Holmes *v.* Bellingham, 7 C. B. (N. S.) 329.

(*b*) Beckett *v.* Corporation of Leeds, Law Rep., 7 Ch. App. 421; Leigh *v.* Jack, 5 Exch. D. 264; Pryor *v.* Petre (1894), 2 Ch. 11.

(*c*) 5 & 6 Will. 4, c. 50, s. 5.

(*d*) Bateman *v.* Bluck, 18 Q. B. 870.

molestation, that will (or may) amount to an *implied* dedication (*e*); and such dedication, whether express or implied, may be either absolute (as it usually is), or subject to some qualification or to some pre-existing right of user (*f*).

The parish is, of common right, bound (as a general rule) to keep in repair any highway within its boundaries, whatever may have been the origin of the road; but, in some cases, the liability to repair attaches (by prescription) to a particular township, or other division of a parish (*g*); and occasionally to the private owner of lands, as where he is bound to repair the highway in right of his estate, *i. e.*, *ratione tenuræ* (*h*); in which latter case, such owner may claim (by grant or prescription) from those who use the road a toll of that species which is called a *toll traverse* (*i*), being a toll taken for passage over the soil of a private owner; as distinguished from a *toll thorough*, which latter toll is the toll sometimes taken for passing along or over a highway or public road (*j*). Moreover, the liability to repair the highway may, in exceptional cases, attach to the mere occupier, by reason merely of his occupation, *i.e.*, *ratione clausuræ* (*k*).

The expense of maintaining bridges is defrayed (like that of roads) by the public; this having been part of the *trinoda necessitas*, to which every man's estate was by the antient law subject, viz., *expeditio contra hostem*, *arcium constructio*, *et pontium reparatio* (*l*); but the burthen of

(*e*) Poole *v.* Huskinson, 11 Mee. & W. 827; The Queen *v.* Petrie, 4 Ell. & Bl. 737; Dawes *v.* Hawkins, 8 C. B. (N. S.) 848; The Queen *v.* Bradfield, Law Rep., 9 Q. B. 552.

(*f*) Poole *v.* Huskinson, supra; Morant *v.* Chamberlin, 6 H. & N. 541; Grand Junction Canal Co. *v.* Petty, 21 Q. B. D. 273.

(*g*) The Queen *v.* Ardsley (Inhabitants), 3 Q. B. D. 255.

(*h*) 3 Geo. 4, c. 126, s. 107; 5 & 6 Will. 4, c. 50, s. 62; R. *v.* Eastrington, 5 A. & E. 765; R. *v.* Heage, 2 Q. B. 128; The Queen *v.* Ramsden, 1 Ell. Bl. & Ell. 949.

(*i*) Com. Dig. Toll.; Willes, 115; Brett *v.* Beales, 10 B. & C. 508; Lord Middleton *v.* Lambert, 1 A. & E. 401.

(*j*) R. *v.* Marquis of Salisbury, 8 A. & E. 716.

(*k*) Reg. *v.* Ramsden, Ell. Bl. & Ell. 949.

(*l*) 1 Bl. Com. 357.

such repair is, in general, not on the parish, but on the county at large in which the bridge is situate (*m*) ; but an individual may be bound *ratione tenuræ* to repair the bridge (*n*) ; or some particular borough within the county may be liable, and not the county at large (*o*) ; and where (as is sometimes the case) a parish is bound by prescription to repair some particular bridge, the parish may contract with the county for the future repair of such bridge at the expense of the county (*p*). The liability of the county extended, at common law, not only to the bridge itself, but to so much of the road as passed over it, and to its ends or approaches; and by the statute 22 Hen. VIII. c 5, the county was made liable to repair three hundred feet either way from the bridge ; and such in general is still the law, as to the repair of bridges built prior to the Highway Act, 1835 (5 & 6 Will. IV. c. 50). But by that statute it was provided, that, in the case of all bridges *thereafter* to be built, the repair of the road itself passing over the bridge (together with the approaches thereto at either end) should be done by the parish, or other the parties bound to the general repair of the highways ; and that the county should remain subject to its former obligation, as regards only "the walls, banks, or fences of the raised causeways, and "*raised* approaches to any bridge, or the land arches "thereof" (*q*). And inasmuch as, before that statute, a parish was liable for the repair of all roads within it, dedicated to and used by the public, although there had been no adoption of such roads by the parish (*r*),—therefore the Highway Act, 1835, enacted, that no road made at the expense of any individual, or body corporate, should be

(*m*) Viner's Abridg. Bridges (A); 43 Geo. 3, c. 59, s. 5; 41 & 42 Vict. c. 77, ss. 21, 22; Re Newport Bridge, 2 Ell. & Ell. 377.

(*n*) Baker *v.* Greenhill, 3 Q. B. 148 ; The Queen *v.* Bedfordshire (Inhabitants), 4 Ell. & Bl. 535.

(*o*) 13 & 14 Vict. c. 64.

(*p*) 22 Hen. 8, c. 5 ; R. *v.* Hendon, 4 B. & Ad. 628 ; Howitt *v.* Nottingham Tramways Co., 12 Q. B. D. 16.

(*q*) 5 & 6 Will. 4, c. 50, s. 21 ; 41 & 42 Vict. c. 77, ss. 21, 22.

(*r*) R. *v.* Leake, 5 B. & Ad. 469.

a highway which the parish was liable to repair, unless three calendar months' notice should be given to the parish surveyor, of the intention to dedicate such road to the public (*s*); and where such notice was given, a vestry considered whether the road was of sufficient utility to justify its being kept in repair by the parish; and in the event of the vestry thinking the road unnecessary, the justices, at the next special sessions for highways, finally determined the matter; and the Act contained also provisions for ensuring that the road should be originally constructed in a proper and substantial manner, before the expense of repairing it was cast upon the parish (*t*).

Any parish, county, borough, or person, who is bound to repair either a road or a bridge, and who neglects the duty, is liable at common law to an indictment (*u*); and to such an indictment,—at least when laid against a parish,—the plea in defence must show, not merely that the parish is not liable, but that some other party is liable, for the repairs (*x*); and the justices may, and in some cases must, order an indictment to be preferred (*y*). But though each parish (or township or other particular district), through whose lands any portion of a highway passes, is liable by the general law of the land to maintain such portion, there are special provisions sanctioned by the legislature for keeping in repair some of the most frequented and important roads of the kingdom. For many of such roads are kept in order, (and some were originally constructed,) under the authority of local *Turnpike Acts:* by the effect of which, the management of such roads has been usually vested, for a certain term of years, in trustees or commissioners; empowered by the Acts to erect toll-gates,

(*s*) 5 & 6 Will. 4, c. 50, s. 23.

(*t*) Ibid.; The Queen *v.* Thomas, 7 Ell. & Bl. 399.

(*u*) Reg. *v.* Turweston, 16 Q. B. 109; Reg. *v.* Inhabitants of Heanor, 6 Q. B. 745; The Queen *v.* Eyton, 3 Ell. & Bl. 390.

(*x*) Rex *v.* Eastington, 5 A. & E. 765.

(*y*) Reg. *v.* Arnould, 8 Ell. & Bl. 550; 5 & 6 Will. 4, c. 50, s. 95.

and to levy tolls from those who pass through, as a fund for defraying the expenses of repairs or improvements; and there is, therefore, a distinction between *highways in general* and *turnpike roads*. It is to be understood, however, that the collection of such tolls does not supersede the other means provided by the law for maintaining highways and bridges. And therefore, if a turnpike road, or the bridge over which such road passes, is allowed by the trustees to fall out of repair, the parishes or other parties who would have been bound to repair it (supposing it not to have become the subject of a turnpike trust) are still, as a general rule, liable to that obligation (*z*). But under particular circumstances, they may be exempt from this duty to repair; for the trustees of a turnpike road may, in certain cases, enter into a contract to repair exclusively, out of the trust funds: and where such exclusive contract is in force, the persons originally liable are discharged from all responsibility (*a*). Also, when any turnpike road becomes again, by the determination of the turnpike trust, an ordinary highway, the balance of moneys (if any) in the hands of the trustees is to be paid over by them rateably amongst the parishes which, upon such determination of the trust, became again bound to maintain the road (*b*). And here it may be usefully mentioned, that, by the 26 & 27 Vict. c. 78, a number of turnpike roads have been converted into *parish highways* (*c*).

(*z*) 3 Geo. 4, c. 126, s. 110; 7 & 8 Geo. 4, c. 24, s. 17; Bussey *v.* Storey, 4 B. & Adol. 109.

(*a*) 3 Geo. 4, c. 126, ss. 106, 107, 108; Howitt *v.* Nottingham Tramways Co., 12 Q. B. D. 16.

(*b*) 30 & 31 Vict. c. 121, s. 3.

(*c*) As regards the "*turnpike roads* of the metropolis north of the Thames," see 7 Geo. 4, c. cxlii; 10 Geo. 4, c. 59; and 26 & 27 Vict. c. 78; and as regards the "*streets*" of the metropolis, see also 57 Geo. 3, c. cxxix; 25 & 26 Vict. c. 61, s. 7; c. 102, s. 73; 30 & 31 Vict. c. 104; and 57 & 58 Vict. c. ccxiii (the London, Streets and Buildings, Consolidation Act); and as regards highways forming the streets in towns generally, see the Towns Improvement Act, 1847 (10 & 11 Vict. c. 34), which consolidates the provisions usually inserted in *Paving Acts*, &c., being the local Acts for the construction of such streets.

Having thus shown, in a general way, the nature of public roads, and their division (for the most part) into (I.) Highways in general, and (II.) Turnpike roads, we propose now to take some notice of the particular provisions applicable to each of these varieties of road.

I. *Highways in general.*—Some highways are regulated by the statutes 5 & 6 Will. IV. c. 50; 4 & 5 Vict. cc. 51, 59; and 8 & 9 Vict. c. 71; and others are regulated by a different group of statutes, viz., 25 & 26 Vict. c. 61; 26 & 27 Vict. c. 61; 27 & 28 Vict. c. 101; and 41 & 42 Vict. c. 77; and we shall consider first the provisions of the former group of statutes, which apply to all highways not otherwise provided for, the highways in the southern parts of Wales being within the provisions of the 5 & 6 Will. IV. c. 50, but having also certain special provisions applicable exclusively to themselves (*d*).

The general plan of the 5 & 6 Will. IV. c. 50, and the Acts by which it has been amended, was to place highways under the care of *surveyors*, appointed for the respective parishes (subject to the superintending power of the justices of the peace at special sessions holden for the highways); and the Acts provided, that the expense of maintaining and repairing the highways should be met by a rate, to be made and levied by the surveyor on the occupiers of land upon the principle of the poor rate (*e*); and which rate was made leviable by distress (*f*). The surveyor of highways was elected annually, by the inhabitants in vestry assembled; and he was required to possess certain property qualifications (*g*). When elected, he was compellable—unless he could show some like ground of exemption as applied to an overseer of the

(*d*) 23 & 24 Vict. c. 68; 41 & 42 Vict. c. 34; and 44 Vict. c. 14.

(*e*) 5 & 6 Will. 4, c. 50, ss. 27, 113; Reg. *v.* Randall, 4 Ell. & Bl. 564.

(*f*) 12 & 13 Vict. c. 14.

(*g*) 5 & 6 Will. 4, c. 50, s. 6; R. *v.* Best, 2 N. S. C. 655; Reg. *v.* Justices of Surrey, 5 D. & L. 40.

poor (*h*),—to take upon himself the office,—being, however, permitted to appoint a deputy, who was subject to the same responsibilities with his principal (*i*). The office was not, in the general case, a paid one; but the vestry might, if they thought proper, appoint a salaried surveyor (*k*); and any two or more parishes might, by mutual agreement, with the consent of the justices in sessions assembled, and for the purposes of the Act, unite themselves into one district, so as to be under the superintendence of a *district surveyor* (*l*); but that officer had no authority to make or levy the highway rate, each parish still electing its own separate surveyor for that purpose (*m*). On the other hand, in large parishes, the duties of the office of surveyor might have been committed to more than one person; for where a parish had a population of more than five thousand, a board of surveyors might have been appointed, called the "Board for the Repair of the Highways," with power to appoint paid officers,—viz., collectors, an assistant surveyor, a clerk, and a treasurer (*n*). And the provisions above stated may be regarded as still in force in all cases to which the 5 & 6 Will. IV. c. 50 was originally applicable, —the changes effected by the Public Health Acts, 1875 and 1890, or by the Local Government Acts, 1888 and 1894, respectively hereinafter referred to, not having made any alteration therein, save in matters of form and language.

The principal duty of the surveyor is to keep the parish highways in repair (*o*); and where any of these are out of repair, complaint may be made (on the oath of one witness) to any justice of the peace, who may grant a summons thereon: but the charge itself is to be heard before the justices at special sessions for the highways; and if those justices—either on their own view, or on the report of an inspector to be appointed by them for the purpose,—find

(*h*) Vide sup. p. 73.
(*i*) 5 & 6 Will. 4, c. 50, ss. 7, 8.
(*k*) Ibid. s. 9.
(*l*) Sects. 13—15.
(*m*) Sects. 16, 17.
(*n*) Sect. 18.
(*o*) Sect. 6.

that a highway is not in thorough and effectual repair, they may convict the surveyor of highways in a penalty not exceeding 5*l.*, and order him to repair within a limited time; and if such order be not complied with, the surveyor of highways incurs the further forfeiture of such sum as shall be judged adequate to the probable expense of the repairs required; and the money is to be applied accordingly to that purpose (*p*). And the same course of proceeding is applicable, *mutatis mutandis*, to the case where an owner is chargeable *ratione tenuræ;* and also to the case of turnpike trustees. But the justices have no power to make such an order, in any case where the *obligation* of repairing comes into question (*q*); for in such latter case, the only remedy is by indictment,—the indictment being preferred, by order of the justices, against the parish or party charged before them, at the next assizes or quarter sessions for the county or place where the highway is situate (*r*); but the indictment is, in general, removed, on *certiorari*, into the Queen's Bench Division (*s*).

Any injury whatever done to a highway, by which it is rendered less commodious to the persons using it, is a public nuisance; and, as such, it is an indictable offence at common law. Also, any person is at liberty to abate the nuisance (wherever this remedy is applicable), by removing the thing by which it is caused (*t*); but locomotives on roads, although in themselves a nuisance, are now legalised by statute (*u*); and the surveyor is, by statute, specially required to remove all obstructions and encroachments on the highways (*x*); and to impound cattle found

(*p*) 5 & 6 Will. 4, c. 50, s. 94.

(*q*) Ibid.

(*r*) Sect. 95; The Queen *v.* Arnold, 8 Ell. & Bl. 550; The Queen *v.* Haslemere, 3 B. & Smith, 313.

(*s*) R. *v.* Sandon, 3 Ell. & Bl. 390.

(*t*) 1 Hawk. P. C. c. 76, ss. 48, 61.

(*u*) 24 & 25 Vict. c. 70; 28 & 29 Vict. c. 83; 41 & 42 Vict. c. 77 (Part II.); and 42 & 43 Vict. c. 67; Powell *v.* Fall, 5 Q. B. D. 597.

(*x*) 27 & 28 Vict. c. 101, s. 51; Harris *v.* Mobbs, 3 Exch. D. 268.

straying thereon (*y*),—the statutes inflicting also penalties on all persons who commit an injury to the highway, or who obstruct the free use thereof (*z*).

By the common law, the course of an antient highway could not be changed, without licence from the crown; to be obtained after suing out a writ of *ad quod damnum*, and after the finding of an inquisition thereon that the alteration would not be prejudicial to the public (*a*); but by the 5 & 6 Will. IV. c. 50, any two justices of the division might (subject to certain conditions and restrictions) order any highway to be widened or enlarged (*b*); also, the inhabitants in vestry assembled might direct the surveyor to apply to two justices of the division, to examine a highway, with a view to its being diverted or stopped up; and if these justices certified in favour of such a proceeding, their certificate to that effect was sent to the quarter sessions, who made the order accordingly (*c*), the owner of the lands through which the new highway was to pass consenting thereto (*d*); but any person aggrieved by the proceeding might appeal from the certificate of the justices to the quarter sessions, before the order of that court was made (*e*); and in the case of such an appeal, the propriety of the stoppage or diversion was to be determined according to the verdict of a jury impannelled to try the question (*f*).

The highway system, under the group of statutes which we have now been considering, not having been found to work

(*y*) 5 & 6 Will. 4, c. 50, ss. 64—69; 27 & 28 Vict. c. 101, s. 25; Keane *v.* Reynolds, 2 Ell. & Bl. 748.

(*z*) 5 & 6 Will. 4, c. 50, s. 72; 27 & 28 Vict. c. 101, s. 25; Walker *v.* Horner, 1 Q. B. D. 4; Taylor *v.* Goodwin, 4 Q. B. D. 228.

(*a*) 1 Hawk. P. C. c. 76, s. 35; Fowler *v.* Sanders, Cr. Jac. 446.

(*b*) 5 & 6 Will. 4, c. 50, s. 82.

(*c*) Sects. 84, 91; The Queen *v.* Harvey, Law Rep., 10 Q. B. 46.

(*d*) Sect. 85; The Queen *v.* Justices of Worcestershire, 3 Ell. & Bl. 447; The Queen *v.* Sir R. Wallace, 4 Q. B. D. 641.

(*e*) Sect. 88; The Queen *v.* Justices of Lancashire, 8 Ell. & Bl. 563.

(*f*) Sect. 89.

in all respects in a satisfactory manner, the other Highway Acts above referred to, (viz., the 25 & 26 Vict. c. 61; 26 & 27 Vict. c. 61; 27 & 28 Vict. c. 101; and 41 & 42 Vict. c. 77,) were passed; and these, without disturbing generally the operation of the Highway Act of 1835, established a fresh plan which any particular county was at liberty to adopt. For, under these more recent statutes, the justices of any county, in sessions assembled, were empowered to form such county (or any part of it) into a *highway district*, to be governed by a *highway board* (*g*); in which board all the property, liabilities, and (in general) all the powers were to vest which previously belonged to the surveyor of highways for the district (*h*); and more than one such district might be formed in the county, or in any part of it; and so far as possible the districts were to be coincident in area with the rural sanitary districts of the county (*i*). All which provisions are, in substance, still in force; and the rural sanitary authority may, upon application to, and with the sanction of, the county authority, exercise within its district, the office of surveyor of highways; and become, in fact, the highway board (*k*); but otherwise the highway board consists of *waywardens*, elected annually from the several parishes within the district (*l*),—together with the *justices* acting for the county, and residing within the district (*m*); and the duties, powers, and liabilities of such highway board (who may appoint a treasurer, clerk, district surveyor, and paid collectors) may be stated, generally, to be the same as those thrown by the 5 & 6 Will. IV. c. 50, upon the surveyors of highways (*n*); and the proceeding to compel a highway board to perform its duties, is analogous to that already mentioned with

(*g*) 25 & 26 Vict. c. 61, ss. 5—9.
(*h*) Ibid. s. 11.
(*i*) 41 & 42 Vict. c. 77, s. 3.
(*k*) Ibid. ss. 4, 5.
(*l*) 25 & 26 Vict. c. 61, ss. 9, 10; 45 & 46 Vict. c. 27; The Queen *v.* Cooper, Law Rep., 5 Q. B. 457.
(*m*) 25 & 26 Vict. c. 61, s. 9; 27 & 28 Vict. c. 101, ss. 20, 31, 45.
(*n*) 25 & 26 Vict. c. 61, s. 17; and 27 & 28 Vict. c. 101, first schedule.

reference to such surveyors (*o*). And with regard to the expenses incurred by the highway board, certain of these are authorized to be charged upon a *district fund*, to which the several parishes forming the district are to contribute; but the other expenses, and, in particular, the expenses of maintaining and keeping in repair its own highways, are a separate charge on each parish; and the sum required for the last-mentioned expenses is to be raised by the parish overseers, out of, or as part of, the poor rates (*p*), and is to be paid over by them to the treasurer of the board; but as regards *disturnpiked* roads, half of the expense of repairing these is to be defrayed out of the county rate (*q*).

II. *Turnpike roads.*—These do not in general fall within the operation of the statutes relative to highways; but are regulated, primarily, by their own local Acts (continued from time to time by the Expiring Laws Continuance Acts); and subject thereto, by statutes of a general character, that is to say, by the statutes applicable to turnpike roads generally (*r*), the Turnpike Act, 1823 (3 Geo. IV. c. 126) being the principal of these general Acts (*s*); and the provisions of the general Turnpike Acts may, as to their general effect, be stated as follows:—

Every trustee or commissioner of a turnpike road must possess a certain qualification in point of property (*t*);—

(*o*) 25 & 26 Vict. c. 61, ss. 18, 19; 41 & 42 Vict. c. 77, s. 10.

(*p*) 25 & 26 Vict. c. 61, s. 20; The Queen *v.* Farrer, Law Rep., 1 Q. B. 558.

(*q*) 41 & 42 Vict. c. 77, s. 13; 45 & 46 Vict. c. 27.

(*r*) 4 Geo. 4, c. 95, s. 90; 3 Chitty's Burn, 177.

(*s*) 3 Geo. 4, c. 126; 4 Geo. 4, cc. 16, 95; 5 Geo. 4, c. 69; 7 & 8 Geo. 4, c. 24; 9 Geo. 4, c. 77; 1 & 2 Will. 4, c. 25; 2 & 3 Will. 4, c. 124; 3 & 4 Will. 4, c. 80; 4 & 5 Will. 4, c. 81; 5 & 6 Will. 4, c. 18; 2 & 3 Vict. c. 46; 3 & 4 Vict. cc. 39, 51; 4 & 5 Vict. cc. 33, 51; 12 & 13 Vict. c. 46; 14 & 15 Vict. c. 38; and (as to the turnpike roads in *South Wales*) 7 & 8 Vict. c. 91; 8 & 9 Vict. c. 61; 10 & 11 Vict. c. 72; 38 & 39 Vict. c. 35; and 51 & 52 Vict. c. 41, s. 13.

(*t*) 3 Geo. 4, c. 126, s. 62.

must make a declaration that he will duly execute his duties (*u*) ; and is prohibited in general from holding any profitable office or contract in respect of the road of which he is trustee (*x*). The justices of the peace, of the different counties or divisions through which the road passes, are *ex officio* commissioners of the trust (*y*). The trustees or commissioners are not only to maintain and keep in repair the roads committed to their management; but are to construct and maintain causeways at the sides of them for the use of foot passengers (*z*) ; to place milestones (*a*) ; and to widen, divert, or improve the roads as they shall think proper; for which purposes, they are empowered to purchase lands ; and, subject to certain conditions, to turn the roads over the property of individuals (*b*) ; and to take materials, for the repair of the roads, from the lands of private owners (*c*) ; and they are also empowered, (if they think proper,) to contract, by the year or otherwise, with any person for repairing or amending the roads, or any bridges or buildings thereon (*d*). The trustees or commissioners are also bound to prevent or to remove all nuisances and annoyances on the roads under their management (*e*) ; and they may direct prosecutions by indictment, or otherwise, for all such nuisances or annoyances (*f*).

To meet the expenses incurred, the trustees or commissioners are authorized to erect toll-gates (*g*) ; and to take tolls thereat, every day from twelve at night to twelve the night following (*h*), putting up at every toll-gate a table of tolls, and providing toll tickets to acknowledge the receipt (*i*) ; and no person, unless specially exempted, may

(*u*) 4 Geo. 4, c. 95, s. 32 ; 31 & 32 Vict. c. 72, s. 12.
(*x*) 3 Geo. 4, c. 126, s. 65 ; 30 & 31 Vict. c. 121, s. 2.
(*y*) 3 Geo. 4, c. 126, s. 61.
(*z*) Ibid. ss. 111, 112, 113.
(*a*) Sect. 119.
(*b*) 9 Geo. 4, c. 77, s. 9 ; 4 Geo. 4, c. 95, s. 65 ; 3 Geo. 4, c. 126, s. 84.
(*c*) 3 Geo. 4, c. 126, s. 97.
(*d*) 4 Geo. 4, c. 95, s. 78.
(*e*) 5 & 6 Will. 4, c. 50, s. 70 ; 27 & 28 Vict. c. 75, s. 1.
(*f*) 3 Geo. 4, c. 126, s. 133.
(*g*) 9 Geo. 4, c. 77, s. 5.
(*h*) Sect. 6.
(*i*) 3 Geo. 4, c. 126, s. 37 ; 4 Geo. 4, c. 95, s. 28.

pass, with any beast or carriage, without paying (*k*): and if a passenger refuses to pay, the toll-collector may seize and distrain his beast or carriage, or any other of his goods; and, in default of payment for four days, may sell such distress (*l*); and any dispute about the amount of the toll due, or the charges of a distress, may be settled by any justice of the peace acting for the place where the toll-gate is situate (*m*),—any misconduct on the part of the toll-collector being also made matter of indictment (*n*). But no toll is to be taken on horses or carriages in attendance on her Majesty (*o*), or on any of the royal family, or returning from such duty (*p*); nor from officers or soldiers in uniform (*q*); nor from volunteers on duty and in uniform (*r*); nor from the police (*s*); nor on carriages carrying, or returning from carrying, commissariat stores (*t*), or materials for turnpike roads or highways; nor (in general) on carts employed in the conveyance of manure, or of implements of industry (*u*), or of produce grown on the land of the owner, and not sold or going to be sold (*x*), or conveying lime for the improvement of the land (*y*); and in general any person, on his way to or from his proper parochial church or chapel,—or to or from his usual place of religious worship, tolerated by law,—either on Sundays, or on any other days on which divine service is by authority ordered

(*k*) Williams *v.* Ellis, 5 Q. B. D. 175.

(*l*) 3 & 4 Geo. 4, c. 126, s. 39.

(*m*) Sect. 40.

(*n*) Sect. 52; 4 Geo. 4, c. 95, ss. 30, 50; R. *v.* Hants (Justices), 1 B. & Adol. 84, 654.

(*o*) Westover *v.* Perkins, 2 E. & E. 57.

(*p*) 3 Geo. 4, c. 126, s. 32; 4 Geo. 4, c. 95, s. 24.

(*q*) 42 & 43 Vict. c. 33, s. 137.

(*r*) 26 & 27 Vict. c. 65, s. 45; Tunstall *v.* Lloyd, 1 B. & S. 95.

(*s*) 2 & 3 Vict. c. 47, s. 10; 3 & 4 Vict. c. 88, s. 1; 14 & 15 Vict. c. 38, s. 4.

(*t*) 3 Geo. 4, c. 126, s. 32; Toomer *v.* Reeves, Law Rep., 3 C. P. 62.

(*u*) 14 & 15 Vict. c. 38, s. 4; Skinner *v.* Visger, Law Rep., 9 Q. B. 199.

(*x*) 3 Geo. 4, c. 126, s. 32; 5 & 6 Will. 4, c. 18; 3 & 4 Vict. c. 51; 14 & 15 Vict. c. 38, s. 4; Foster *v.* Tucker, Law Rep., 5 Q. B. 224.

(*y*) 13 & 14 Vict. c. 79, s. 3.

to be celebrated (*z*), is exempt from paying toll. Parishioners are also exempted in attending or returning from the funeral of persons who die and are buried in the parish in which the turnpike road lies; as also are rectors, vicars, or curates going to, or returning from, their parochial duties (*a*); also, voters going to, or returning from, the election of a member for the county in which the road is situated; and all horses or other cattle, as well as vehicles of every description, are exempted which only cross a turnpike road, or do not pass along it above a hundred yards (*b*). The trustees are empowered, on obtaining the previous consent in writing of the secretary of state, to borrow money, as they may think proper, on the credit of the tolls; and may mortgage them, by way of security, to the lenders (*c*); and they may, subject to the regulations in this behalf prescribed by the Acts, let the tolls to farm for three years at a time (*d*); and may compound for tolls with any person or persons for a year at a time; or may reduce or increase (within the provisions of their Acts) the amount of the tolls (*e*); or may, generally, make such other arrangements as circumstances require (*f*).

But as regards all roads which since the 31st December, 1870, have ceased, or which after that date shall cease, to

(*z*) 3 Geo. 4, c. 126, ss. 32, 33; Lewis *v.* Hammond, 2 B. & A. 206.

(*a*) Layard *v.* Overy, Law Rep., 3 Q. B. 415.

(*b*) 3 Geo. 4, c. 126, s. 32; 4 & 5 Vict. c. 33; Veitch *v.* The Trustees of Exeter Roads, 8 Ell. & Bl. 986; Stanley *v.* Mortlock, Law Rep., 5 C. P. 497; Harding *v.* Headington, ib. 9 Q. B. 157.

(*c*) 3 Geo. 4, c. 126, s. 81. See 12 & 13 Vict. c. 87; 13 & 14 Vict. c. 79; 14 & 15 Vict. c. 38; 15 & 16 Vict. c. 33; 17 & 18 Vict. cc. 51, 58; 18 & 19 Vict. c. 102; 19 & 20 Vict. c. 12; 20 & 21 Vict. c. 9; 21 & 22 Vict. c. 80; 22 & 23 Vict. c. 33; 23 & 24 Vict. cc. 70, 73; 24 & 25 Vict. c. 46, s. 2; 26 & 27 Vict. c. 98; 27 & 28 Vict. c. 79; 28 & 29 Vict. c. 91; 29 & 30 Vict. c. 92; 30 & 31 Vict. c. 66; 31 & 32 Vict. c. 66; 33 & 34 Vict. c. 22; The Queen *v.* French, 2 Q. B. D. 187; 4 Q. B. D. 507.

(*d*) 3 Geo. 4, c. 126, s. 55; Stott *v.* Clegg, 13 C. B. (N. S.) 619.

(*e*) 3 Geo. 4, c. 126, s. 43; 4 Geo. 4, c. 95, s. 13; R. *v.* Trustees of Bury and Stratton Roads, 4 B. & C. 361.

(*f*) 35 & 36 Vict. c. 72.

be turnpike roads, it has been provided, by the 41 & 42 Vict. c. 77 (commonly called the Highways and Locomotives (Amendment) Act, 1878), that all such roads shall become or be deemed "main roads" (sect. 13); and as regards any highway within its district, the highway authority may (with the sanction of the county authority) declare such road to be a "main road" (sect. 15); and by the like authority, a main road may be reduced again to the character of an ordinary highway (sect. 16).

Under the provisions of the Local Government Act, 1888 (*g*), the administrative business of the justices of the county in quarter sessions assembled relative to bridges, and roads repairable with bridges, and the powers as to highways (and locomotives thereon), which were theretofore vested in the county authority, are transferred to the county council established by the Local Government Act, 1888 (sect. 3); and such council is also thereby authorized to purchase or otherwise acquire any existing bridges which are not county bridges, and to erect new bridges, thereafter maintaining same (sect. 6). And as regards "main roads," within the 41 & 42 Vict. c. 77 above mentioned, the maintenance, repair, and improvement thereof (together with the bridges carrying the same, when repairable by the highway authority) are thrown upon the county council; which is to have for these purposes all the powers, and to be under all the duties, of a highway board (sect. 11). But any urban sanitary authority may claim to retain such roads within its own district; in which latter case, the urban authority is to receive, from the county council, an annual payment towards the expense of their maintenance and repair, and of their reasonable improvement (sect. 11); and the county council may also contract with any district council (as defined by the Act) (*h*) for the maintenance, repair, and improvement of main roads (sect. 11). Also, before the county council

(*g*) 51 & 52 Vict. c. 41. (*h*) Ibid. s. 100.

declares any road to be a main road, they are first to see that the road is in a proper state of repair. As regards the "main roads" situate within any "*county* borough," these are transferred (with the cost of their maintenance, repair, and improvement) to the council of such borough; but as regards the main roads within other boroughs, these are to be dealt with as main roads of the administrative county within the area of which such boroughs are comprised (sect. 35); the urban sanitary authority of such borough may, nevertheless, retain, and is given the right to retain, its own main roads, equally as in the case of county boroughs (sect. 38). Moreover, nothing in the Local Government Act, 1888, affects any liability to repair *ratione tenuræ* (sect. 97).

Under the Local Government Act, 1894 (*i*), the district councils established by that Act for rural sanitary districts are become also, in general, the highway authorities for such districts, and have in that particular superseded the highway boards; and they have succeeded to all the duties and have acquired all the rights of such boards, together with power to enforce the repairs of all highways that are repairable *ratione tenuræ* (sect. 25).

(*i*) 56 & 57 Vict. c. 73.

CHAPTER VIII.

OF THE LAWS RELATING TO NAVIGATION,—AND TO THE MERCANTILE MARINE.

In attempting to make a concise statement of the laws relating to Navigation and Merchant Shipping, we shall distribute our statement under the following heads:—(I.) The laws relating to navigation; (II.) The laws relating to the ownership, registration, and transfer of merchant ships; (III.) The laws relating to merchant seamen; (IV.) The laws relating to pilotage; (V.) The laws relating to lighthouses, beacons, and seamarks; (VI.) The laws relating to the liability of shipowners for loss or damage; and (VII.) The laws relating to fishing boats and to sea-fisheries.

I. *The Laws relating to Navigation.*—Until the year 1825, this subject was in the main regulated by [the Navigation Act of 12 Charles II. c. 18,—an Act the provisions of which in a more rudimentary form had been first framed in 1650 (*a*), *i.e.*, in the time of the Parliament; and these provisions (it is said) were framed, with the object of dealing a blow to our own sugar islands, which were disaffected to the Parliament and still held out for Charles II., by stopping or crippling their trade with the Dutch (*b*), and with the object also of clipping the wings of those our

(*a*) Scobell, 132.

(*b*) Mod. Univ. Hist. xii. 289.

[opulent and enterprising neighbours (*c*); with which objects in view, this law prohibited all ships of foreign nations from trading with any English plantation without a licence from the council of state. In 1651, the prohibition was extended also to ships trading with the mother country: consequently, no goods were suffered to be imported into England, or into any English dependency, in any other than English bottoms, or in the ships of that European nation, of which the merchandize imported was the genuine growth or manufacture. At the Restoration, these baleful provisions were continued, by the Navigation Act just mentioned, with this beneficial provision added thereto, namely, that the master and three-fourths of the seamen should be English, the object being to encourage, by the exclusion of foreign competitors, the ships, seamen, and commerce of Great Britain.]

In the reign of King George the fourth, both the Navigation Act and all other navigation Acts then in force were repealed, and a new system of regulations was established (*d*); and the new system was afterwards amended by various statutes passed in the reign of King William the fourth (*e*), and in the earlier part of the reign of her present Majesty (*f*); but the new system, or any of the amendments thereof, did not involve any material departure from the policy of encouraging our own mercantile marine and commerce, by prohibitions of the like nature in general to those above described. More recently, however, under the influence of the doctrines commonly designated as those of free trade (*g*), a new course of legislation (commencing

(*c*) 1 Bl. Com. 418.

(*d*) 6 Geo. 4, c. 105.

(*e*) 3 & 4 Will. 4, cc. 54, 55, 59.

(*f*) 8 & 9 Vict. cc. 88, 89, 93.

(*g*) In his Wealth of Nations, vol. ii. p. 194, Adam Smith (who may be called the father of "free trade") considered, that the Act of Navigation "was not favourable "to the growth of that opulence "which should arise from foreign "commerce; for that a nation will "be most likely to buy cheap, when "by the most perfect freedom of "trade it encourages all nations to "bring to it the goods which it "has occasion to purchase; and a "nation will be most likely to sell

with the statute 12 & 13 Vict. c. 29) was entered upon, and has been since consistently pursued; until at length the old system of prohibition (which latterly had come to be confined only to the coasting trade of the United Kingdom and of the Channel Islands) (*h*) has been relinquished altogether; except only as regards the trade from one part of any British possession in Asia, Africa, and America, to another part of the same possession—as to which latter trade, the law still is, that it shall not be carried on except in British ships (*i*); though, upon an address from the legislature of any such possession, praying that the conveyance of goods or passengers may take place, as far as they are concerned, free from such restriction, her Majesty is empowered to authorize the same by order in council, on such terms as she may think fit (*k*). In all other respects, foreign vessels are now generally allowed a free commercial intercourse with this country and its dependencies, upon terms of perfect equality with our own vessels—a concession qualified, however, in the first instance, by some very important provisions, tending to confine such intercourse to such nations as consented, on their part, to concede to us a reciprocal and equal freedom. For, by the 16 & 17 Vict. c. 107, ss. 324—326, it was enacted, that if British vessels were subjected, in any foreign country, to any *prohibitions* or *restrictions*, as to the voyages in which they might engage or the articles which they might import or export, her Majesty might, by order in council, impose corresponding prohibitions and restrictions upon the ships of such foreign country; and further, that if British ships were directly or indirectly subjected, in any foreign country, to *duties or charges* from which the national vessels of such country were exempt; or if any duties were imposed there upon articles imported or exported in British ships,

"dear, when its markets are thus "filled with the greatest number "of buyers."

(*h*) 12 & 13 Vict. c. 29; 17 & 18 Vict. c. 5; 18 & 19 Vict. c. 96, ss. 13, 14, 15.

(*i*) 16 & 17 Vict. c. 107, s. 163.

(*k*) Sect. 328.

which were not equally imposed upon the like articles in national vessels; or if *any preference whatsoever was shown*, either directly or indirectly, to vessels of such country over British vessels, or to articles imported or exported in the former, over the like articles imported or exported in the latter; or if British trade and navigation were not placed by such foreign country on *as advantageous a footing as the trade and navigation of the most favoured nation*,—then, and in any of these cases, her Majesty might, by order in council, impose such duties of tonnage upon the ships of such foreign nation, or such duties on goods imported or exported in its ships, as would countervail the disadvantages to which British trade or navigation was subjected. And these provisions still remain substantially in force, notwithstanding that the Act 16 & 17 Vict. c. 107 has been now in great part repealed (*l*).

The next five of the subjects enumerated at the outset of this chapter are in the main regulated by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), which now supersedes and consolidates the provisions contained in a series of Acts called "The Merchant Shipping Acts, 1854 to 1892," being (among other Acts of less importance) the various Acts following, viz., 17 & 18 Vict. c. 104 (*m*); 18 & 19 Vict. c. 91; 25 & 26 Vict. c. 63; 30 & 31 Vict. c. 124; 34 & 35 Vict. c. 110; 35 & 36 Vict. c. 73; 36 & 37 Vict. c. 85; 39 & 40 Vict. c. 80; 43 & 44 Vict. cc. 22, 43; 45 & 46 Vict. c. 76; 47 & 48 Vict. c. 43; 50 & 51 Vict.

(*l*) 38 & 39 Vict. c. 66; 39 & 40 Vict. c. 36, s. 288. See also 3 & 4 Will. 4, c. 93; 3 & 4 Vict. c. 56; 6 & 7 Vict. c. 80; and 57 & 58 Vict. c. 60 (containing restrictive and regulative provisions regarding the trade with any British possessions on or near the Continent of Europe; or in Africa; or within the Mediterranean Sea; and regarding the trade with India and China; and the coasting trade of India).

(*m*) The Merchant Shipping Act, 1854, referred to in the text, was in the nature of a complete code of shipping law; and by the Merchant Shipping (Repeal) Act, 1854 (17 & 18 Vict. c. 120), numerous prior enactments on the subject were repealed.

c. 62; 51 & 52 Vict. c. 24; 52 & 53 Vict. cc. 43, 46, 68, and 73; 53 & 54 Vict. c. 9; and 55 & 56 Vict. c. 37; and with regard to all these matters, they are (by sect. 713) placed under the general superintendence of that committee of the privy council which is commonly described as the Board of Trade. It will be necessary, however, to treat of these five subjects separately, each in its due order, but only in such general and concise manner as the nature of this treatise permits. And here we may conveniently premise, firstly, that (besides the provisions hereinafter referred to) the Merchant Shipping Act, 1894, contains divers analogous provisions applicable to the colonies and to other the Queen's dominions abroad (*m*); and, secondly, that the Act contains also specific provisions relative to *fishing boats*,—for the due register thereof on the "Fishing Boats Register" (sects. 373—375), and for the maintenance of discipline on board, and otherwise for the due management and regulation, of these boats (sects. 376—398), including *trawlers* (sects. 399—417); but these latter provisions, which are of a very multitudinous character, cannot be dealt with in this chapter.

II. *The Laws relating to the Ownership, Registration, and Transfer of Merchant Ships.*—The Merchant Shipping Act, 1894, provides, that no ship shall be deemed a British ship unless she belong wholly to owners of some or one of the following descriptions, namely,—natural-born subjects; persons made denizens, or naturalized by Act of Parliament, or by the proper legislative authority of some British possession; or bodies corporate established under the laws of, and having their principal place of business in, the United Kingdom or some British possession (*n*); but as to natural-born subjects, it is provided that none can be an owner who has taken the oath of allegiance to any foreign

(*m*) 57 & 58 Vict. c. 60, ss. 91, 712, superseding 17 & 18 Vict. c. 104, s. 17.
(*n*) 57 & 58 Vict. c. 60, s. 1.

sovereign or state,—unless he has subsequently resumed his allegiance to the Queen, and is and continues during the whole of his ownership resident within her Majesty's dominions, or if not so resident, then is a partner in a firm actually carrying on business within her Majesty's dominions; and persons made denizens or naturalized,—when they too have taken such oath of foreign allegiance, are subject to the like provisions; moreover, nothing in the Naturalization Act, 1870, is "to qualify an 'alien' to be the owner of a British ship" (*o*). And the Merchant Shipping Act, 1894, further provides, that every British ship (with some few exceptions) must be *registered* (*p*); and unless registered, she is not to be recognized as a British ship, or to be entitled to any of the advantages, or to the protection, usually enjoyed by such a ship, or to use the national flag or to assume the national character (*q*). Also, a vessel which is required by the Act to be registered may be detained until the master of the ship, if so required, produces the certificate of the due registration of the vessel. The registration is effected, in the United Kingdom, at any port approved by the proper authority for the registry of ships; and is made with the collector, comptroller, or other principal officer of the customs in such port (*r*); and the port at which any ship is registered is thereafter considered as that to which she belongs, till her registry is transferred to another port (*s*). The registration comprises, *inter alia*, the name of the ship,—which must have been previously marked on each of her bows, and

(*o*) 33 & 34 Vict. c. 14, s. 14.

(*p*) 57 & 58 Vict. c. 60, s. 2. The exceptions are—1. Ships not exceeding fifteen tons burthen, employed solely on the rivers or coasts of the United Kingdom, or of some British possession within which the managing owners reside; 2. Ships not exceeding thirty tons burthen, and not having a whole or fixed deck, employed solely coastwise, on the shores of Newfoundland, or parts adjacent, or in the Gulf of St. Lawrence, or on such portion of the coasts of Canada as lie bordering on such gulf.

(*q*) The Andalusian, 3 P. D. 182.

(*r*) 57 & 58 Vict. c. 60, s. 4.

(*s*) Sect. 13.

(together with her port of registry) on her stern, in a permanent and conspicuous manner to the satisfaction of the Board of Trade (*t*); and also the names and descriptions of the owners (*u*). And with regard to the owners that may be registered, the Act provides as follows:—(1) The property in every ship is always to be divided for this purpose into sixty-four shares (*x*); (2) No person is to be registered as owner of any fractional part of a share (*y*); (3) The individuals registered as owners of the sixty-four shares are not to exceed sixty-four (formerly thirty-two) in number, except that any number of persons, not exceeding five, may be registered as the joint owners of any particular share (*z*); (4) The property in the ship or its shares, so far as regards the power of making title to a purchaser or mortgagee, is vested exclusively in the registered owners (*a*); but any number of other persons may be *beneficially or equitably* interested therein, and may enforce their rights as such in the Court of Chancery (*b*); (5) A registered ship, or any share therein, when disposed of to a person qualified to be the owner of a British ship (*c*), is *transferred* by a bill of sale, or deed, in the prescribed form, the name of the transferee being entered on the register (*d*), and no other registration thereof being required; and (6) A registered ship or any share therein may be *mortgaged* by instrument in the prescribed form (*e*), the mortgage being entered on the register (*f*); and where there are several mortgagees, their respective priorities are in all cases determined according to the times of their respective registrations, and not the times of their respective execu-

(*t*) Sect. 7.
(*u*) Sect. 11.
(*x*) Sect. 5.
(*y*) Ibid.
(*z*) Ibid.
(*a*) Sects. 5, 24, 56.
(*b*) Sects. 5, 57; Liverpool Marine Credit Co. *v.* Wilson, Law Rep., 7 Ch. App. 507; Rusden *v.* Pope, ib. 3 Exch. 269.
(*c*) Sect. 24.
(*d*) Sects. 24—26.
(*e*) Sect. 31; Ward *v.* Beck, 13 C. B. (N. S.) 668; The Innisfallen, Law Rep., 1 Adm. & Ecc. 72.
(*f*) Ibid.

tions (*g*); and when a mortgage is discharged, the entry thereof on the register is to be vacated (*h*). The Act contains also minute provisions, relative to the preliminaries to registration and the mode of compliance therewith; and relative to the transmission of the title to the ship, otherwise than by transfer, as, *e.g.*, on death, marriage, and the like; and provides also (among other things) for the granting of *certificates of mortgage and sale* to the registered owners of the ship, enabling them to mortgage the ship or their share therein, or to sell the whole ship, abroad out of the country of its registry.

III. *The Laws relating to Merchant Seamen.*—These laws have chiefly in view the great national object of promoting the increase of our mercantile marine, of securing their health efficiency and discipline, and of affording them all due encouragement and protection. And in furtherance of these objects, the Act of 1894, continuing in these respects the like provisions contained in the earlier Merchant Shipping Acts, provides, that local marine boards shall be established at certain of the sea ports of the United Kingdom, for carrying into effect the particular provisions of the Act, under the general superintendence of the Board of Trade (*i*). And in every such seaport, its local marine board is required to establish a mercantile marine office or offices, under the management of *Superintendents* (*k*); whose business it is, to afford facilities for engaging seamen by means of registries of their names and characters; to superintend and facilitate their engagement and discharge; to provide means for securing the presence on board, at the proper times, of men so engaged; to encourage the making of apprenticeships to the sea service; and generally, to perform such other duties relating to merchant seamen and merchant ships, as may be

(*g*) Sect. 33.
(*h*) Sect. 32.
(*i*) Sect. 244.
(*k*) Sects. 246, 247.

committed to them by the Board of Trade (*l*). Examinations also are instituted for persons intending to become masters or mates of foreign-going ships, or of home-trade passenger ships, before examiners appointed by the local marine board (*m*); and no person is to be employed in a foreign-going ship as master, or as first or second or only mate—or in a home-trade passenger ship, as master or first or only mate—unless he possesses a "certificate of competency" to be obtained after such examination (*n*); or (in the case of a person who has attained a certain rank in the service of her Majesty) a "certificate of service" (*o*); either of which certificates (according to the nature of the case) is to be granted by the Board of Trade, to such persons as it finds to be entitled to them. And the Act provides also for certificates of competency as engineers being granted, to persons desirous of obtaining the same (*p*).

In addition to these provisions, there are a variety of others, intended for the protection of seamen, and for promoting their health and comfort, among which we may note the following, namely:—that the master of every ship—except those of less than eighty tons registered tonnage exclusively employed in the coasting trade of the United Kingdom—shall, in the case of every seaman whom he carries to sea from any part of the United Kingdom, enter into an agreement with him (*q*), in a form sanctioned by the Board of Trade, and signed by both master and seaman (the master to sign before the seaman signs), setting forth the nature and duration of the voyage, or else the maximum period of the voyage or engagement, and the places or parts of the world (if any) to which it is not to extend, the number and description of the crew, the time at which each seaman is to be on board, or to begin work, the capacity in which he is to serve,

(*l*) Sect. 247.
(*m*) Sect. 94.
(*n*) Sect. 92.
(*o*) Sect. 99.
(*p*) Sect. 96.
(*q*) Sect. 113.

the amount of his wages, a scale of provisions, together with the approved and agreed regulations as to conduct and as to fines or other punishments for misconduct (*r*). The Act also provides, that no right to wages shall be dependent on the earning of freight (*s*),—an innovation upon the common law, which regarded freight as the mother of wages; and that every stipulation on the part of the seaman, for abandoning his right to wages, in the event of the loss of the ship, or any right which he may have or obtain in the nature of salvage, shall be wholly inoperative (*t*). The Act also provides, that seamen and apprentices in any ship shall have such space allotted to them as in the Act is specified (*u*); and which space is to be kept free from stores or goods of any kind (not being the personal property of the crew in use during the voyage), and is to be properly constructed and ventilated (*x*); also, that every ship, navigating between the United Kingdom and any place out of the same, shall (besides having a due supply of wholesome provisions and water) (*y*) be properly supplied with medicines, to be examined by medical inspectors appointed for that purpose (*z*), and who may also inspect the state of health of the seamen (*a*). The Act also provides, that "official log-books" shall be kept in every ship (except those employed exclusively in the coasting trade of the United Kingdom), in such form as is prescribed by the Board of Trade, either in connection with or distinct from the ordinary log-books; and that, in all cases, entry shall be made in the official log-books (as soon as possible after the occurrence), of every offence committed and punishment inflicted, and of every case of illness, injury, or death (*b*).

(*r*) Sect. 114.
(*s*) Sect. 157.
(*t*) Sect. 156; The Rosario, 2 P. D. 41; 25 & 26 Vict. c. 63, s. 18.
(*u*) Sect. 210.
(*x*) Ibid.
(*y*) Sects. 198, 199.
(*z*) Sects. 200—209.
(*a*) Sect. 203.
(*b*) Sects. 239—243; see also 46 & 47 Vict. c. 41, ss. 13 to 23

Careful provisions have also been made to protect seamen as well as others from the dangers which arise from ships being sent to sea in an unseaworthy and unsafe condition. Thus, in the first place, it is enacted by sect. 463 of the Act of 1894, continuing the like provision contained in the 34 & 35 Vict. c. 110, s. 7, that when any seaman or apprentice is being proceeded against for deserting his ship, or for neglecting or refusing to join, or for being absent or quitting her without leave, and it shall be alleged by a certain proportion of the seamen belonging to such ship that by reason of unseaworthiness, overloading, improper loading, defective equipment, or for any other reason, she is not in a fit condition to proceed to sea, or that the accommodation therein is insufficient,—the court having cognizance of the case may inquire into such allegations, and in case of doubt may order a survey of the vessel, and the costs of such survey are directed to follow the event thereof. And in the second place, by sects. 459, 460 of the Act of 1894, continuing (in effect) the like provisions contained in the 39 & 40 Vict. c. 80, s. 6, as amended by the 42 & 43 Vict. c. 72, 50 Vict. c. 4, 53 & 54 Vict. c. 9, and 55 & 56 Vict. c. 37, it is provided, that (in effect) whenever the Board of Trade has reason to believe, on complaint or otherwise, that any British ship is by reason of the defective condition of her hull, equipments, or machinery, or of her overloading or improper loading, unfit to proceed to sea without serious danger to human life, having regard to the service for which she is intended, the Board may direct that the ship shall be provisionally detained, as an unsafe ship, for the purpose of being surveyed by some competent person; and on his report, the Board may make such further order as it shall think requisite, either as to the detention of the ship or as to

(*agreements with seamen*); ss. 24 to 27 (*their wages and discharge*); ss. 28 to 35 (*their discipline*); and ss. 43 to 45 (*their health*). See also, as to boy apprentices in the *sea service*, 17 & 18 Vict. c. 104, ss. 141—145; and in the *sea-fishing service*, 46 & 47 Vict. c. 41.

her release, and either absolutely or upon such conditions as the Board may impose (*c*). And, if, upon such survey, it is reported by the "Court of Survey" having cognizance of the case, that is to say, by the "Wreck Commissioner," that there was not reasonable and proper cause for the provisional detention of the ship, the Board of Trade is made liable to pay the owner his costs, and also compensation for any loss or damage sustained in consequence of the detention; but if the report be to the effect that the ship was unsafe, then the Board of Trade is to have its costs from the owner, which costs are made recoverable as salvage and otherwise (*d*). And it is further enacted, by sect. 457 of the Act of 1894, continuing the like provisions contained in the 39 & 40 Vict. c. 80, s. 4, that a master who shall knowingly take, and an owner who shall send or attempt to send, a ship to sea, in such an unseaworthy state as is likely to endanger the life of any seaman or other person, shall be guilty of an indictable *misdemeanor*, unless he proves, either that he used all reasonable means to ensure her being sent to sea seaworthy, or that her going to sea in an unseaworthy state was, under the circumstances, reasonable and justifiable.

The Act of 1894, in continuance of the like provisions contained in the earlier Merchant Shipping Acts, has further provided, that there shall be, in the port of London, a "General Register and Record Office for Seamen" (*e*); and that, as regards every foreign-going ship, the master thereof shall, within forty-eight hours after her arrival at her final port of destination in the United Kingdom, or upon discharge of the crew, (whichever first happens,) deliver, to the Superintendent of the Mercantile Marine Office before whom the crew is discharged, a list containing, *inter alia*, the number and date of the ship's register and her registered tonnage; the length and general nature of

(*c*) Lewis *v.* Gray, 1 C. P. D. 452.

(*d*) Sect. 460.

(*e*) Sect. 251.

her voyage or employment; the names, ages, and places of birth of the master, the crew, and the apprentices; their ratings on board their last ships or other employments; and the dates and places of their joining the ship; and further, that as regards every home-trade ship, the master or owner thereof shall, every half-year, that is to say, on or within twenty-one days after the 30th June and 31st December in each year, transmit or deliver to some Mercantile Marine Superintendent in the United Kingdom, a similar list for the preceding half-year: and that all such lists, together with other documents in the Acts particularized, shall be transmitted, by the Superintendents by whom they have been received, to the "Registrar-General of Shipping and Seamen"; to be by him recorded and preserved, and produced to any person desirous of inspecting the same (*f*). And in addition to all these provisions, it is further directed, that there shall be transmitted, by the proper authorities, every half year, that is to say, on or before the 1st day of February and 1st day of August in every year, to such Registrar-General a list of all ships which shall be registered in any port in the United Kingdom, and also of all ships whose registers have been transferred or cancelled in such port since the last preceding return; and the registrars of shipping make monthly, and may be required to make even shorter, returns of the like particulars of transfer (*g*).

IV. *The Laws relating to Pilotage.*—These laws apply to the United Kingdom only (*h*), being municipal laws; and as regards such laws, the Merchant Shipping Act, 1894 (*i*), recognizes and confirms the powers and jurisdictions heretofore lawfully exercised by various bodies of persons in different parts of the kingdom, with regard to the appointment and regulation of pilots for the districts for which they

(*f*) Sects. 253, 256.
(*g*) Sect. 63.
(*h*) Sect. 572.
(*i*) Sects. 573, 574.

respectively act. These bodies have been commonly called "Pilotage Authorities"; and the most important of them is the Trinity House of Deptford Strond; which is a company of masters of ships, incorporated in the reign of Henry the eighth, and charged under many successive charters and Acts of Parliament with numerous duties relating to the marine. Where there is no such authority already existing, for any place or district in the United Kingdom, the Board of Trade constitutes the pilotage authority, and fixes its district (in which new district, however, there is no *compulsory* pilotage) (*k*).

The "Pilotage Authorities" (*l*) are severally enabled, by bye-laws to be made with the consent of her Majesty in council, to determine the qualifications to be required from persons applying to them to be licensed as pilots, whether in respect of their age, skill, time of service, character, or otherwise; and to issue licences, accordingly, to such persons as are qualified; and to make regulations, for the government of the pilots they so license (*m*), including the withdrawal or suspension of any licence, and the terms upon which any special licence may be granted; and they are required to deliver periodically to the Board of Trade returns, comprising (among other particulars) the names and ages of all pilots or apprentices acting under their authority, and the nature of the service for which each is licensed (*n*); and these returns are laid by the Board of Trade, without delay, before both houses of parliament (*o*). And every pilotage authority may, by bye-law made with the consent of her Majesty in council, exempt (within the limits of its own district) the masters of any ships, or of any classes of ships, from being compelled to employ qualified pilots (*p*); and the Board of Trade also may, by provisional order confirmed by parliament, exempt masters from being

(*k*) Sect. 575.
(*l*) Sect. 581.
(*m*) Sect. 582; Henry *v.* Newcastle Trinity House Board, 8 Ell. & Bl. 723.
(*n*) Sect. 585.
(*o*) Ibid.
(*p*) Sect. 581.

obliged to employ pilots in any, or in any part of any, pilotage district (*q*). Also, the master or mate of any ship may apply to any pilotage authority, to be examined as to his capacity to pilot the ship to which he belongs, or any one or more ships belonging to the same owner, within any part of the district of such pilotage authority; and if he is found competent, a pilotage certificate is granted, to enable him to pilot such ships himself within the limits therein described, without incurring a penalty for failing to employ a qualified pilot (*r*). But every master of a ship not so *exempted* navigating within any district, who, after a qualified pilot has offered to take charge of her or has made a signal for that purpose, either himself pilots the ship without possessing a pilotage certificate enabling him to do so, or employs or continues to employ an unqualified person to pilot her, incurs for every such offence a penalty of double the amount of pilotage demandable for the conduct of such ship (*s*); and the like penalty is incurred by the master of an *exempted* ship, who, under the like circumstances, employs or continues to employ an unqualified person to pilot her.

With regard to the Trinity House in particular, that pilotage authority is allowed to appoint and license pilots for the limits following, that is to say, (1.) "The London District," comprising the waters of the Thames and Medway, as high as London Bridge and Rochester Bridge respectively, and the seas and channels leading thereto or therefrom, as far as Orfordness to the north and Dungeness to the south, but so nevertheless that no pilot shall be licensed to conduct ships both above and below Gravesend; (2.) "The English Channel District," comprising the seas between Dungeness and the Isle of Wight; and (3.) "The Trinity House Outport Districts," comprising any pilotage

(*q*) Sect. 578.

(*r*) Sect. 599.

(*s*) Sect. 603; The Queen *v.* Stanton, 8 Ell. & Bl. 445; The Tyne Improvement Commissioners *v.* The General Steam Navigation Company, Law Rep., 2 Q. B. 65.

district, for the appointment of pilots within which no particular provision is made by Act of Parliament or charter (*t*). And, as a general rule, the employment of pilots in the first and third of these districts is compulsory (*u*), subject to a penalty (*x*), and subject to this, that certain classes of ships, *when not carrying passengers* (*y*), are exempted from compulsory pilotage in the London District and the Trinity House Outport Districts, that is to say,—(1.) Ships employed in the coasting trade of the United Kingdom; (2.) Ships of no more than sixty tons burthen; (3.) Ships trading from any port in Great Britain within the London District or any of the Trinity House Outport Districts to the port of Brest in France, or to any port in Europe north and east of Brest, or to the Channel Islands or Isle of Man; (4.) Ships trading from the port of Brest or any port in Europe north or east of Brest, or from the Channel Islands or Isle of Man, to any port in Great Britain within the London District or the Trinity House Outport Districts; and (5.) Ships navigating within the limits of the port to which they belong (*z*). And the Act contains also a general provision, to the effect that no owner or master of any ship shall be answerable to any person whatever, for any loss or damage exclusively occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any district where the employment of such pilot is compulsory by law (*a*).

V. *The Laws relating to Lighthouses, Beacons, and Seamarks.*—By our law, the power of erecting, placing, and

(*t*) Sect. 618.

(*u*) Sect. 622; "The Hanna," Law Rep., 1 Adm. & Ecc. 283.

(*x*) Ibid.

(*y*) "The Lion," Law Rep., 2 Adm. & Ecc. Ca. 102.

(*z*) Sect. 625.

(*a*) Sect. 633; Tyne Improvement Commissioners *v.* General Steam Navigation Company, Law Rep., 2 Q. B. 65; Moss *v.* The African Steam Ship Company, ib. 2 P. C. Ca. 238; "The Lion," ib. 525; Clyde Navigation Company *v.* Barclay, 1 App. Ca. 790; "The Princeton," 3 P. D. 90; "The Mary," 5 P. D. 14.

maintaining lighthouses, beacons, and seamarks is incident to the royal prerogative (*b*); but by 8 Eliz. c. 13, it was specially committed to the Trinity House; and the authority of this corporation was subsequently confirmed and also regulated by successive statutes, and principally by the earlier Merchant Shipping Acts. And now by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), it is provided, that subject to the particular provisions of the Act, and subject to any powers or rights theretofore lawfully exercised by any person or body of persons having authority over *local* lighthouses, buoys, or beacons, and who in and by the Act are styled "Local Lighthouse Authorities," the superintendence and management of all lighthouses, buoys, and beacons shall be vested (for England, Wales, Jersey, Guernsey, Sark, and Alderney, and the adjacent seas and islands, and for Gibraltar, and formerly Heligoland) in the *Trinity House*, and (for Scotland and the adjacent seas and islands, and the Isle of Man) in the *Commissioners of Northern Lighthouses*, and (for Ireland and the adjacent seas and islands) in the *Commissioners of Irish Lights;* which three bodies are distinguished from the "Local Lighthouse Authorities" by the name of General Lighthouse Authorities (*c*), every General Lighthouse Authority regulating, within its own jurisdiction, and with the sanction of the Board of Trade, the proceedings of the local lighthouse authority or authorities (*d*), and being itself subject to the regulations of the Board of Trade. And the Act gives power to each General Lighthouse Authority, within its own jurisdiction, to erect or make new lighthouses, buoys, or beacons, and to alter or remove existing ones, and to vary the character of any lighthouse, or the mode of exhibiting lights therein (*e*). But these powers are not to be exercised, in the case of the General Lighthouse Authorities for Scotland or Ireland, without

(*b*) Vide sup. vol. II. p. 493.
(*c*) Sect. 634.
(*d*) Sect. 652.
(*e*) Sect. 638.

the sanction of the Trinity House, and the approval of the Board of Trade (*f*); and the *Trinity House* may, with the previous sanction of the Board of Trade, direct these two last-mentioned General Lighthouse Authorities, within their respective jurisdictions, to continue any existing lighthouses, buoys, or beacons, and to erect or place, alter or remove, any new ones, and to vary the character of any lighthouse, or the mode of exhibiting lights therein (*g*).

The Act also provides, that upon the completion of any new lighthouse, buoy, or beacon, her Majesty may, by order in council, fix reasonable *dues* to be paid by the master or owner of every ship passing, or deriving benefit from, the same (*h*); but no such dues in Guernsey, Jersey, Sark, or Alderney, are to be taken without the consent of the States of those Islands respectively; and the powers given to the Trinity House in respect of any lighthouse, buoy, or beacon, placed or hereafter to be placed in Guernsey or Jersey, are to be exercised only with the consent of her Majesty in council (*i*).

The Act contains also provisions for the punishment of all persons wilfully or negligently injuring any lighthouse, buoy, or beacon, or removing, altering, or destroying any light-ship, buoy, or beacon, or riding by, making fast to, or running foul of, any light-ship or buoy, or burning or exhibiting (after being duly warned to the contrary by notice from the proper General Lighthouse Authority) any fire or light so placed as to be liable to be mistaken for a light proceeding from a lighthouse (*k*). And by sects. 530 and 531, in continuance of the like provisions contained in the 40 & 41 Vict. c. 16, s. 5 (The Removal of Wrecks Act, 1877), as amended by the 52 & 53 Vict. c. 5, the proper general Lighthouse Authority is to remove any wreck which is or is likely to become an obstruction or danger to navigation,—this duty being, however, (in the case of

(*f*) Sect. 638.
(*g*) Sect. 641.
(*h*) Sect. 644.
(*i*) Sect. 669.
(*k*) Sects. 666, 667.

wreck in any harbour,) placed on the harbour commissioners, and (in the case of wreck in any tidal river) on the river conservancy board (*l*).

VI. *The Laws relating to the Liability of Shipowners.*—Formerly, while discussing the law of carriers, we had occasion incidentally to state the nature and extent of a shipowner's responsibility for loss or damage to *goods* on board his ship for carriage (*m*); and we have now to add, that a shipowner as a general rule is liable also for any injury to the passengers in his ship, being responsible generally for the way in which his ship is managed by those whom he employs, in the same way that an ordinary master is liable for the conduct of his servants (*n*). But a limit is placed by statute to the amount of damages recoverable from a shipowner who is *personally* blameless, it being provided by sect. 503 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), in continuance of the like provision contained in the 25 & 26 Vict. c. 63, s. 54 (*o*), that in case loss arises without his actual fault or privity, the owner of any ship (whether British or foreign) shall not be answerable in damages, in respect of loss of life or personal injury (either alone or together with loss or damage to property), to an aggregate amount exceeding *fifteen pounds* for each ton of the ship's tonnage; nor in respect of injury to property (whether there be in addition

(*l*) The marine insurance society called Lloyd's is, by Lloyd's Signal Stations Act, 1888 (51 & 52 Vict. c. 29), authorized to erect signal stations and signal houses, and to establish telegraphic communication therewith, subject to the approval of the Board of Trade, and to acquire lands for the purpose; but (by sect. 10) no such erection is to be made which, in the opinion of the general lighthouse authority of the place, would interfere with any lighthouse, beacon, or seamark.

(*m*) Vide sup. vol. II. p. 92.

(*n*) Steel *v.* Lester, 3 C. P. D. 121.

(*o*) "The Obey," Law Rep., 1 Adm. & Ecc. 102; "The Northumbria," ib. 3 Adm. & Ecc. 6, 24; Smith *v.* Kirby, 1 Q. B. D. 131.

loss of life or personal injury or not), to an aggregate amount exceeding *eight* pounds for each ton of such tonnage (*p*). And by way of making further provision for the protection of shipowners, it has been further enacted (*q*), that in all cases where several claims are made or apprehended against any owner for compensation,—whether for loss of life or personal injury, or for the loss or damage of ships, boats, or goods,—proceedings may be instituted at the suit of the owner for the purpose of determining his aggregate liability, and the court may distribute the amount rateably among the several claimants, and may stay all other proceedings in relation to the same subject-matter (*r*). With regard, however, to all these provisions of the Merchant Shipping Act, it is material to observe that none of them is to lessen or take away any liability to which any *master* or *seaman*, being also owner or part owner of the ship to which he belongs, is subject in his capacity of master or seaman (*s*).

With a view to the protection of shipowners from the multiplicity of actions to which (it was supposed) a single shipping casualty might otherwise have exposed them, where loss of life or other personal injury had resulted, or was alleged to have resulted, to several persons with different claims and rights, the Merchant Shipping Act, 1854 (*t*), provided as follows, that is to say:—By direction of the Board of Trade the sheriff summoned a jury to inquire into the number, names, and descriptions of all persons killed or injured on board the ship by reason of the wrongful act, neglect, or default; and at this inquiry the sheriff presided, the Board of Trade being plaintiff, and the shipowner defendant. If the verdict was for the defendant, his costs were paid by the Board of

(*p*) Glaholm *v.* Barker, Law Rep., 1 Ch. App. 223; "The Bernina," 13 App. Ca. 1.

(*q*) Sect. 504.

(*r*) "The Franconia," 3 P. D. 164.

(*s*) Sect. 508.

(*t*) 17 & 18 Vict. c. 104, ss. 507 et seq.

Trade; but if for the plaintiff, then damages were assessed at 30*l.* for each case of death or personal injury; and the aggregate amount was paid to her Majesty's paymaster-general, and was distributed by him as the Board of Trade directed, the Board having power to direct payment to each person injured—or in case of death, to the husband, wife, parent, or child of the deceased—of such compensation, (not exceeding in any case the statutory amount,) as the Board thought fit; and the Act provided, that until that inquiry had been instituted,—or until the Board had (for one month after notice by a claimant) refused to institute it—no person should commence any legal proceeding, in respect of his claim for loss of life or personal injury arising out of any such accident: but after completion of the inquiry, if any person injured (or, in case of death, his or her personal representative) estimated the damages in respect of such injury at a greater sum than the statutory amount, or such amount as the Board of Trade had accepted by way of compromise,—he or she was at liberty, upon repayment to the shipowner of the amount paid, to bring an action for damages in the ordinary way, any damages which he or she recovered in such action being, however, payable only out of the residue (if any) of the aggregate amount aforesaid; and if such damages did not exceed double the statutory amount, the plaintiff bringing such action had to pay to the defendant the costs of the action, as between solicitor and client. The Merchant Shipping Act, 1894, has, however, repealed all these peculiar provisions, and has not re-enacted any similar provisions in their place,—so that the special mode of procedure lastly before described must now be regarded as obsolete, and the ordinary procedure in the Court of Admiralty, or (as the case may be) in other the appropriate division of the High Court, must for the future be resorted to in all such cases (*u*).

(*u*) "The Bernina," 13 App. Ca. 1.

VII. *The Laws relating to Fisheries.*—There are a great many statutes relating to fisheries, and providing for their maintenance and development (*x*); and in particular for the protection of the breed of fish, and for the prevention of practices tending to destroy the spawn or fry; and providing also (in the case of the sea-fisheries) for the protection and safety of the persons engaged in this peculiarly hazardous occupation, and for their moral and spiritual welfare (*y*). The principal of these statutes are the following:—18 Geo. III. c. 33; 44 Geo. III. c. xlv; 46 Geo. III. c. xix; 9 Geo. IV. c. 39; 7 & 8 Vict. c. 95; 8 & 9 Vict. c. 26; 10 & 11 Vict. cc. 91, 92; 14 & 15 Vict. c. 26; 21 & 22 Vict. c. cxli; 23 & 24 Vict. c. 92; 24 & 25 Vict. cc. 72, 109; 25 & 26 Vict. c. 97; 26 & 27 Vict. c. 50; 27 & 28 Vict. c. 118; 28 & 29 Vict. cc. 22, 121; 30 & 31 Vict. c. 52; 31 & 32 Vict. c. 45; 32 & 33 Vict. c. 31; 36 & 37 Vict. c. 71; 38 & 39 Vict. c. 15; 39 & 40 Vict. cc. 19, 34, 36, s. 100; 40 & 41 Vict. cc. 42, 65; 41 & 42 Vict. c. 39; 42 & 43 Vict. cc. 26, 67; 47 Vict. c. 11; 47 & 48 Vict. c. 26; 49 Vict. c. 2; 49 & 50 Vict. c. 39; 50 & 51 Vict. c. 4; 51 & 52 Vict. c. 54; 54 & 55 Vict. c. 37; 55 & 56 Vict. c. 50; and 57 & 58 Vict. c. 26 (*z*). And in addition to these Acts (which are more or less general), there are also numerous Acts of a special and local character, regulating particular local fisheries, or

(*x*) *Bounties* were formerly payable upon the taking and curing of certain kinds of fish, and upon the vessels employed in these industries; but all such bounties have long been repealed. (1 & 2 Geo. 4, c. 79; 5 Geo. 4, c. 64; 7 Geo. 4, c. 34.)

(*y*) See 51 & 52 Vict. c. 18, and 56 & 57 Vict. c. 17, being Acts for the regulation of the liquor traffic among fishing boats and fishermen engaged in the North Sea; and enforcing certain conventions in that behalf entered into by this country with Belgium, Holland, Denmark, and Germany, in 1887; and see also the general provisions contained in 57 & 58 Vict. c. 60, ss. 369—417.

(*z*) The Acts 44 & 45 Vict. c. 11 (as to *clam* and *bait*), and 47 & 48 Vict. c. 20 (as to *oysters*, *crabs*, and *lobsters*), are repealed by the 51 & 52 Vict. c. 54; and the Northumberland herring fishery is now subject to the 54 & 55 Vict. c. 28.

regulating specific fishing industries, or the trade in specific fish, or the trade in fish of particular towns and places. Thus, the trade in fish, as regards the cities of London and Westminster, is governed by the statutes 2 Geo. III. c. 15; 9 & 10 Vict. c. cccxlvi; and 22 & 23 Vict. c. 29,—the general object of which Acts is to secure a supply of fresh fish to those cities, and to prevent the same being forestalled.

And the fisheries of *Ireland* (in particular) are now regulated by the 5 & 6 Vict. c. 106; 7 & 8 Vict. c. 108; 8 & 9 Vict. c. 108; 9 & 10 Vict. cc. 3, 86; 11 & 12 Vict. c. 92; 13 & 14 Vict. c. 88; 26 & 27 Vict. c. 114; 29 & 30 Vict. c. 45; 32 & 33 Vict. cc. 9, 92; and 37 & 38 Vict. c. 86. And as regards the seas between the United Kingdom and France, the fisheries therein are regulated by the conventions between this country and France that were entered into respectively in 1839 and 1867, and which are enforced respectively (so far as regards the subjects of the Queen) by the 6 & 7 Vict. c. 79, and 31 & 32 Vict. c. 45, and by the Acts amending the same Acts respectively. And as regards the North Sea (*i. e.*, the seas between the shores of England and Scotland on the one hand, and Belgium, Holland, Denmark, and Germany on the other hand), the fisheries therein are regulated by the convention entered into between these several countries in 1882, and which is enforced (so far as regards the subjects of the Queen) by the 46 & 47 Vict. c. 22. Treaties also exist between her Majesty and the United States of America, relating (*inter alia*) to the rights of fishery off Newfoundland, &c., as between the British North American colonies and the United States; and such treaties were carried into effect by the 18 & 19 Vict. c. 3; 35 & 36 Vict. c. 45 (specially enforcing the treaty of Washington of May 8, 1871); and 38 & 39 Vict. c. 52. And there is also the treaty relative to the Behring Sea Seal Fishery, which was prepared for by the 54 & 55 Vict. c. 19, and is now enforced under the provisions of the 56 & 57 Vict. c. 23, and 57 & 58 Vict. c. 2.

All these various fishery laws have relation either to what are called Freshwater Fisheries (including Salmon Fisheries) or to what are called Sea Fisheries. The Acts relating to freshwater fish generally (other than trout and char) are the 41 & 42 Vict. c. 39, 47 & 48 Vict. c. 11, and 55 & 56 Vict. c. 50; and the Acts relating to trout and char are 28 & 29 Vict. c. 121; 36 & 37 Vict. c. 71; 39 & 40 Vict. c. 19; 41 & 42 Vict. c. 39; 47 & 48 Vict. c. 11; and 55 & 56 Vict. c. 50 (*a*); and the Acts specially relating to salmon, and which are called the "Salmon Fishery Acts, 1861 to 1892" (*b*), are 24 & 25 Vict. c. 109; 28 & 29 Vict. c. 121; 36 & 37 Vict. c. 71; 49 & 50 Vict. c. 39; and 55 & 56 Vict. c. 50. The Acts relating to the sea fisheries are the other Acts above specified,—some of these (and in particular 31 & 32 Vict. c. 45; 32 & 33 Vict. c. 31; and 38 & 39 Vict. c. 15) relating more especially to oysters, and others of them (and in particular 40 & 41 Vict. c. 42; and 47 & 48 Vict. c. 46) relating more especially to crabs and lobsters (*c*); and as regards all sea-fish (including lobsters, crabs, shrimps, prawns, oysters, mussels, cockles, and other kinds of shell-fish, but not, of course, salmon), and all sea-fisheries, provision has now been made by 51 & 52 Vict. c. 54, and 54 & 55 Vict. c. 37, for the establishment (for the better regulation of the industries connected therewith) of sea-fisheries districts and local fisheries committees, with power to make bye-laws (subject to the approval of the Board of Trade) relating to such fisheries, but so always as not to interfere with any salmon conservancies or harbour boards.

(*a*) Price *v.* Bradley, 16 Q. B. D. 148.

(*b*) Leconfield *v.* Lonsdale, Law Rep., 5 C. P. 657; Watts *v.* Lucas, ib. 6 Q. B. 226; Holford *v.* George, ib. 3 Q. B. 639.

(*c*) And see 39 & 40 Vict. c. 36, providing (sect. 48) for the free import of lobsters, &c., in British ships without report or entry. See also 38 & 39 Vict. c. 18 (as to the *seal* fisheries off the coast of Greenland); and the 57 & 58 Vict. c. 2 (as to the *seal* fisheries in Behring Straits).

CHAPTER IX.

OF THE LAWS RELATING TO THE SANITARY CONDITION OF THE PEOPLE.

The attention of the legislature has been at various times directed to the health of the people,—more often than not after the occurrence of some epidemic, and for the purpose of averting its course or mitigating its effects; but latterly legislation of a more preventive character has been copiously resorted to, and with the best remedial effects. Among the earliest enactments relating to the health of the people, may be instanced the stat. 1 Jac. I. c. 31, regarding the *Plague*,—under which statute, it was a capital felony for any person having a plague sore upon him uncured to go abroad and converse in company, after being commanded by the proper authorities to keep his house; but the statute has been repealed (*a*), the epidemic to which it was alone applicable not having again visited this island for now nearly 300 years.

The laws relating to *quarantine* are the next of the sanitary laws of an early date of which mention may properly be made,—*quarantine* being the term applied to that period of probation during which vessels arriving from countries infected with certain contagious disorders are placed in restraint by the law. All countries have more or less adopted some law of quarantine; the earliest known quarantine law being the edict of Justinian, A.D. 542;

(*a*) 7 Will. 4 & 1 Vict. c. 91, s. 4.

and in our own country, the first statute on the subject was 9 Anne, c. 2; but that statute, with several others passed for its amendment in the reigns of George the first and George the second, has been repealed by the 6 Geo. IV. c. 78; which consolidates the whole law of quarantine; and which enacts, that all vessels, as well of war as others, coming from any place whence the crown, by the advice of the privy council, shall have adjudged it probable that the plague or other infectious disease of a highly dangerous kind may be brought; and all vessels and boats receiving persons or goods out of the same; and all persons and goods on board the vessels so arriving, or so receiving as aforesaid,—shall be liable to "quarantine," within the meaning of the Act and of any order or orders in council concerning quarantine; and they shall be obliged to perform quarantine, in such place or places (known by the name of *lazarets*), for such time and in such manner, as shall from time to time be directed by order in council, notified by proclamation or published in the London Gazette; and until they shall have been discharged from such quarantine, they shall not come on shore, or be put on board any other vessel or boat, except in such cases, and by such licence, as the order in council may direct (*b*); and for breach of quarantine, either as to persons or as to goods, the offender is visited with a heavy fine; and is besides punishable with imprisonment for six months (*c*); but the privy council may, in any individual case, shorten the period of quarantine, or absolutely release therefrom any particular vessels, persons, or goods (*d*). The Act provides also (among other things), that the lords of the privy council, or any two of them, may make such order as they shall think necessary upon any unforeseen emergency, or in any particular case, with respect to any vessel or goods arriving with an infectious disease on board, or

(*b*) 6 Geo. 4, c. 78, s. 2.
(*c*) Sects. 17, 26.
(*d*) Sect. 6.

arriving under any suspicious circumstances as to infection; and this, although such vessels shall *not* have come from any place from which the crown has declared it probable that any dangerous disease may be brought; and that the lords of the privy council may make the like order in the case of any infectious disease or distemper breaking out in the United Kingdom, so as to isolate all persons afflicted therewith from the rest of the community.

In the year 1832, on the occasion of the outbreak in this kingdom of the Asiatic *cholera*, the statute 2 & 3 Will. IV. c. 10 empowered the privy council to issue such orders as might appear to them expedient, with a view to prevent the spread of the disease, and for the relief of persons afflicted thereby, and for the interment of its victims; and this Act was continued by the 3 & 4 Will. IV. c. 75, until the end of the then next session of parliament; but was not further continued,—its further continuance having become unnecessary by the disappearance of the epidemic, and by the establishment of those more general provisions for the prevention of disease, of which we shall presently give some account. And in or about the year 1840, owing to the then prevalence of *Small-pox*, it was thought fit, by the 3 & 4 Vict. c. 29, to institute throughout the country a system of compulsory vaccination, and, at the same time, to abolish the former practice of inoculation; and the 3 & 4 Vict. c. 29, having been subsequently amended by various statutes (*e*), was repealed (together with the amending Acts) by the statute 30 & 31 Vict. c. 84; in which last-mentioned Act, and in the 34 & 35 Vict. c. 98, and 37 & 38 Vict. c. 75 (called respectively the Vaccination Acts, 1867, 1871, and 1874), the whole law now in force on this subject is contained. And by these Vaccination Acts, the guardians of every union or parish, which has not already been divided into vaccination districts, are required to make such division forthwith; and

(*e*) 4 & 5 Vict. c. 32; 16 & 17 Vict. c. 100; 21 & 22 Vict. c. 25, s. 7; and 24 & 25 Vict. c. 59.

all guardians are to enter into a contract, with some duly registered medical practitioner, for the vaccination of all persons residing in each district, and who is to be termed the public vaccinator; and it is made incumbent on every parent (or other person having the custody of a child) to take his child, within three months after its birth, to such public vaccinator, or else to some other medical practitioner, for the purpose of its being vaccinated; and (in the case of a public vaccination) to repeat his visit at the expiration of a week, in order that the vaccinator may ascertain that the operation has been successful; and (in the case of a private vaccination) to procure and transmit to the vaccination officer a certificate to that effect; and every parent (or other person made responsible) who neglects to perform these duties is liable, on summary conviction, to a penalty of twenty shillings (*f*); and the Acts provide also, that any person attempting to produce inoculation, shall be liable on summary conviction to be imprisoned for any term not exceeding one month (*g*); and a justice of the peace, if satisfied that a child under the age of fourteen has not been vaccinated, and has not already had the small-pox, may order the parent to vaccinate such child, within a certain time, under the penalty of twenty shillings (*h*).

We come now to consider the more general provisions of the legislature for the preservation and improvement of the public health; and these (especially during the last few years) have been so numerous, and they are also so minute, that it is impossible to do much more than refer the reader generally to the statutes themselves; and for this purpose, these statutes have been grouped in a note at the end of this chapter. But it will be proper to refer at some length, and specifically, to the Public Health Act, 1875 (38 & 39 Vict. c. 55),—an Act passed to consolidate and

(*f*) 30 & 31 Vict. c. 84, s. 29; Knight *v.* Halliwell, Law Rep., 9 Q. B. 412.

(*g*) 30 & 31 Vict. c. 84, s. 32.

(*h*) Sect. 31; Broadhead *v.* Holdsworth, 2 Exch. D. 321.

amend (and which, at the same time, repeals) the previous statutes on the subject; and we must first give the reader some information regarding these previous statutes.

There was, firstly, the Public Health Act, 1848 (*i*), under which, on the petition of a certain proportion of the ratepayers of any town, parish, or other place with a known and defined boundary, praying to have the benefit of the Act, an inspector was directed to examine into the facts; and if he reported in favour of the prayer of the petition, the Act was then applied to such place, either by order in council or by special Act of Parliament; and the provisions of this Act were afterwards amended by the Local Government Act, 1858 (*k*), and subsequently by the statutes 24 & 25 Vict. c. 61, and 26 & 27 Vict. c. 17; and these several statutes (inclusive of the Public Health Act, 1848) are the group of statutes referred to in the Public Health Act, 1875, under the designation of "The Local Government Acts" (*l*).

Secondly, there was the Diseases Prevention Act, 1855 (*m*), whereby (as amended by the 23 & 24 Vict. c. 77, ss. 10—12), it was provided, that from time to time official inquiries should be set on foot as to matters concerning the public health; and that when any part of England appeared to be threatened with, or to be affected by, any formidable disease (epidemic, endemic, or contagious), the Act might be there put in force; for the purpose of effecting speedy interments; and for house to house visitations; and for the dispensing of medicines, and providing such medical aid and accommodation as might be required,—the execution of the Act being thereby entrusted to the "local authority," that is to say, to the guardians and overseers of the parish; but both of these Acts were repealed (except as regards the metropolis) by the Public Health Act,

(*i*) 11 & 12 Vict. c. 63.
(*k*) 21 & 22 Vict. c. 98.
(*l*) 38 & 39 Vict. c. 55, Sched. V. Part I.
(*m*) 18 & 19 Vict. c. 116.

1875 (*n*), and (as regards the metropolis) by the Public Health (London) Act, 1891 (*o*).

Thirdly, there was the Nuisances Removal Act, 1855 (*p*), whereby (as amended by the 23 & 24 Vict. c. 77, 26 & 27 Vict. c. 117, and 29 & 30 Vict. cc. 41, 90) it was enacted, that the "local authority" established for the execution of the Act should appoint, or join with other local authorities in appointing, for each place a "Sanitary Inspector" or "Inspectors;" whose duties should be to attend at the meetings of the Board, and, under the instructions of the Board, to examine into nuisances (*q*); for which purpose the local authorities and their officers were empowered to enter upon and to examine any premises as to which any suspicion of nuisance existed or complaint was made (*r*); to inspect all articles of food exposed for sale, or in the course of carriage or preparation for sale or use (*s*); and also to summon any offender before the justices; and to obtain an order requiring the abatement or discontinuance of any nuisance found on any premises, or the destruction of any article of food unfit for the food of man (*t*). But all these Acts were repealed (except as regards the metropolis) by the Public Health Act, 1875, and (as regards the metropolis) by the Public Health (London) Act, 1891.

Fourthly, the carrying out of the Public Health Act, 1848, having been originally entrusted to certain commissioners called "the General Board of Health," and that Board having ceased to exist in the year 1858, when certain of its duties were transferred to the Home Department, and others of them to the Privy Council,—in the

(*n*) 38 & 39 Vict. c. 55.
(*o*) 54 & 55 Vict. c. 76.
(*p*) 18 & 19 Vict. c. 121.
(*q*) Sect. 8.
(*r*) Cocker *v.* Cardwell, Law Rep., 5 Q. B. 15.
(*s*) Young *v.* Grattridge, Law Rep., 4 Q. B. 166.
(*t*) 18 & 19 Vict. c. 121, ss. 12—27; Ex parte The Mayor of Liverpool, 8 Ell. & Bl. 537; The Queen *v.* Cotton, 1 E. & E. 203; Amys *v.* Creed, Law Rep., 4 Q. B. 122.

year 1871 it was considered desirable to concentrate, in a single department of the government, the supervision of the laws relating to (among other matters) the public health and local government; and accordingly, by the Local Government Board Act, 1871 (*u*), a permanent board, called the Local Government Board, was established; and in such board were vested (among other powers and duties) all the powers and duties theretofore vested in or imposed upon the Home Department, or the Privy Council, with reference to the Local Government Acts and the Diseases Prevention Act, 1855; and shortly after the establishment of the Local Government Board, there was passed the Public Health Act, 1872 (*x*), under which (as amended by the 37 & 38 Vict. c. 89) England was divided into *urban sanitary districts* and *rural sanitary districts;* the former consisting of all boroughs, Improvement Act districts, and local government districts (*y*); and the latter consisting of such poor law unions as were not coincident in area with, or wholly included in, any urban district (*z*). And the statute directed, that every urban sanitary district should be subject to local authorities called "urban sanitary authorities;" and that every rural sanitary district should be subject to "rural sanitary authorities"; and there were transferred to such *urban* authority (among other powers and duties) all the powers, rights, and duties of a "local board" under the Local Government Acts, and of the "nuisance authority" under the Nuisances Removal Act (*a*); and there were transferred to each *rural* authority (among other powers and duties) all the powers, rights, and duties of any authority under the Nuisances Removal Acts and the Diseases Prevention Acts. But both these Acts of 1872 and 1874 were repealed (except as regards the metropolis) by the Public

(*u*) 34 & 35 Vict. c. 70.
(*x*) 35 & 36 Vict. c. 79.
(*y*) Sect. 60.
(*z*) Sect. 5.
(*a*) Sect. 7.

Health Act, 1875, and (as regards the metropolis) by the Public Health (London) Act, 1891.

And we are now brought to the Public Health Act, 1875 (38 & 39 Vict. c. 55) and to the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76). Now the Public Health Act, 1875,—which has been recently amended by the Public Health Act, 1890 (53 & 54 Vict. c. 59),—adopts the division of England into urban sanitary districts and rural sanitary districts as established by the repealed Public Health Act, 1872; and entrusts to the respective sanitary *authorities* of these districts the carrying out of the *sanitary* provisions of the Act, with regard to sewers and drains; the cleansing of streets and removal of refuse; the supply of water; the regulation of lodging-houses; the suppression of nuisances, and similar matters; and also the *local government* provisions of the Act, with regard to the regulation of highways; the paving and lighting of streets and buildings; providing public pleasure-grounds, markets, and slaughter houses; making bye-laws for licensing horses and boats for hire, and other like matters; and the local authority is to execute, or see to the execution of, the measures referred to in the Diseases Prevention Act, 1855, for "the prevention of diseases"; and is also to cause nuisances to be abated, in the same general way as previously under the Nuisances Removal Act, 1855. And the Public Health (London) Act, 1891,—which has been amended by the 56 & 57 Vict. c. 47,—adopts for the metropolis (that is to say, for the administrative county of London) the pre-existing sanitary authorities, that is to say, for the city of London, the Commissioners of Sewers; for the port of London, the Mayor, Commonalty, and citizens of the city; for each of the metropolitan parishes (other than Woolwich, and other than parishes aggregated into districts), the vestry of the parish; for Woolwich, the local board of health; for each district of aggregated parishes, the district board of health; and for certain

liberties or privileged parts of London, the guardians of the poor, or poor law union (*b*), as the sanitary authorities for the execution of the Act; and entrusts to such authorities respectively all the like powers and duties as (under the Public Health Act, 1875) are entrusted to the sanitary authorities thereby constituted, and which are above enumerated or referred to,—besides certain other powers and duties more immediately applicable to the circumstances of the metropolis; *e.g.*, powers relative to bakehouses and unsound food; water-closets and refuse; smoke consumption; underground rooms; and in addition thereto, some very special powers as to infectious diseases (their notification, treatment, and prevention) (*c*).

(*b*) 54 & 55 Vict. c. 76, s. 99 (referring to the 18 & 19 Vict. c. 120; 48 & 49 Vict. c. 33; and 50 & 51 Vict. c. 17,—being respectively the Metropolis Management Acts, 1855, 1885, and 1887); 56 & 57 Vict. c. 55.

(*c*) The following enactments are more or less immediately connected with the public health:—

Accidents affecting Life.—57 & 58 Vict. c. 28.

Adulteration.—35 & 36 Vict. c. 74; 42 & 43 Vict. c. 30; 56 & 57 Vict. c. 56.

Alkali Works.—26 & 27 Vict. c. 124; 31 & 32 Vict. c. 36; 35 & 36 Vict. c. 79, s. 35; 37 & 38 Vict. c. 43; 44 & 45 Vict. c. 37; 55 & 56 Vict. c. 30.

Arsenic (*Sale of*).—14 & 15 Vict. c. 13.

Artizans' Dwellings.—38 & 39 Vict. c. 36; 42 & 43 Vict. cc. 63, 64; 43 & 44 Vict. c. 8; 45 & 46 Vict. c. 54; 48 & 49 Vict. c. 72; 53 & 54 Vict. cc. 16, 70; 57 & 58 Vict. c. 55.

Bakehouses.—26 & 27 Vict. c. 40.

Baths.—9 & 10 Vict. c. 74; 10 & 11 Vict. c. 61; 41 & 42 Vict. c. 14; 45 & 46 Vict. c. 30.

Boiler Explosions.—45 & 46 Vict. c. 22; 53 & 54 Vict. c. 35.

Burials.—15 & 16 Vict. c. 85; 16 & 17 Vict. c. 134; 17 & 18 Vict. c. 87; 18 & 19 Vict. c. 79; c. 105, ss. 11—13; c. 128; 20 & 21 Vict. c. 81; 22 Vict. c. 1; 23 & 24 Vict. c. 64; 25 & 26 Vict. c. 100; 30 & 31 Vict. c. 133; 31 & 32 Vict. c. 47; 34 & 35 Vict. c. 33; 43 & 44 Vict. c. 41; 44 & 45 Vict. c. 2; 45 & 46 Vict. c. 19; 47 & 48 Vict. c. 72; 48 & 49 Vict. c. 21; 49 & 50 Vict. c. 20.

Cabmen's Shelters.—53 & 54 Vict. c. 59, s. 40.

Canal Boats, used as Dwellings.—40 & 41 Vict. c. 60; 47 & 48 Vict. c. 75.

Cattle (*Contagious Disorders among*).—41 & 42 Vict. c. 74; 47 & 48 Vict. cc. 13, 47; 49 & 50 Vict. c. 32; 53 & 54 Vict. c. 14; 55 & 56 Vict. c. 47; 56 & 57 Vict. c. 43; 57 & 58 Vict. c. 57.

Chimney Sweepers.—38 & 39 Vict. c. 70; 57 & 58 Vict. c. 51.

Contagious Diseases (*Notification of*).—52 & 53 Vict. c. 72; (*Prevention of*).—53 & 54 Vict. c. 34; and (*Isolation Hospitals*).—56 & 57 Vict. c. 68.

Contagious (*Venereal*) *Diseases, at certain Naval and Military Stations.*—29 & 30 Vict. c. 35; 31 & 32 Vict. c. 80; 32 & 33 Vict. c. 96; all which three Acts have, however, been now repealed by the 49 Vict. c. 10.

Dairies.—53 & 54 Vict. c. 34, s. 4.

Dancing and Music.—53 & 54 Vict. c. 59, s. 51.

Electric Lighting.—45 & 46 Vict. c. 56; 51 & 52 Vict. c. 12.

Epidemics.—46 & 47 Vict. c. 59; and 52 & 53 Vict. c. 64.

Explosives.—46 & 47 Vict. c. 3.

Factories, &c.—41 & 42 Vict. c. 16; 46 & 47 Vict. c. 53; 54 & 55 Vict. c. 75; and (as to *Cotton* Factories) 52 & 53 Vict. c. 62; and (as to London) 54 & 55 Vict. c. 76.

Fruit Pickers' Lodgings.—45 & 46 Vict. c. 23.

Gas.—22 & 23 Vict. c. 66; 23 & 24 Vict. c. 146.

Gymnasiums.—54 & 55 Vict. c. 22.

Hackney Carriages (*and Omnibuses*).—10 & 11 Vict. c. 89; 52 & 53 Vict. c. 14.

Horseflesh (*Sale of*).—52 & 53 Vict. c. 11.

Libraries.—18 & 19 Vict. c. 70; 29 & 30 Vict. c. 114; 34 & 35 Vict. c. 71; 40 & 41 Vict. c. 74; 47 & 48 Vict. c. 37; 50 & 51 Vict. c. 22; 52 & 53 Vict. c. 9; 53 & 54 Vict. c. 68; 55 & 56 Vict. c. 53; 56 & 57 Vict. c. 11.

Lodging Houses, &c., for Artizans and Labourers.—14 & 15 Vict. cc. 28, 34; 16 & 17 Vict. c. 41; 18 & 19 Vict. c. 121, s. 43; 31 & 32 Vict. c. 130; 38 & 39 Vict. c. 36; 42 & 43 Vict. cc. 63, 64; and *for Seamen*—57 & 58 Vict. c. 60, ss. 214—217.

Margarine, &c.—50 & 51 Vict. c. 29.

Mines.—35 & 36 Vict. c. 77; 45 & 46 Vict. c. 3; and 50 & 51 Vict. c. 58 (the last-mentioned Act repealing the former Mines Acts of 35 & 36 Vict. c. 76; 44 & 45 Vict. c. 26; and 49 & 50 Vict. c. 40); see also 57 & 58 Vict. c. 52.

Museums.—54 & 55 Vict. c. 22.

National Portrait Gallery.—52 & 53 Vict. c. 25.

Public Walks, Open Spaces, &c.—23 & 24 Vict. c. 30; 50 & 51 Vict. c. 32; 51 & 52 Vict. c. 40; 52 & 53 Vict. c. 71.

Quarries.—50 & 51 Vict. c. 19; 57 & 58 Vict. c. 42.

Rivers (*Pollution of*).—39 & 40 Vict. c. 75; 56 & 57 Vict. c. 31.

Seamen.—57 & 58 Vict. c. 60.

Sewers.—23 Hen. 8, c. 5; 3 & 4 Edw. 6, c. 8; 13 Eliz. c. 9; 3 & 4 Will. 4, c. 22; 4 & 5 Vict. c. 45; 12 & 13 Vict. c. 50; 24 & 25 Vict. c. 133; 38 & 39 Vict. c. 55; 46 & 47 Vict. c. 37.

Shop Hours.—49 & 50 Vict. c. 55; 55 & 56 Vict. c. 62; 56 & 57 Vict. c. 67; and (as to railways) 56 & 57 Vict. c. 29.

Streets.—55 & 56 Vict. c. 57.

Threshing Machines.—41 & 42 Vict. c. 12; 57 & 58 Vict. c. 37.

Unsound Fish.—38 & 39 Vict. c. 55.

Workmen's Trains.—46 & 47 Vict. c. 34.

Workshops.—30 & 31 Vict. c. 146; 33 & 34 Vict. c. 19; 34 & 35 Vict. c. 104; 54 & 55 Vict. c. 75; and (as to London) 54 & 55 Vict. c. 76.

There are also the following further Acts, exclusively relating to the *Metropolis* :—

Local Management.—18 & 19 Vict. c. 120; 19 & 20 Vict. c. 112; 21 & 22 Vict. c. 104; 25 & 26 Vict. c. 102; 32 & 33 Vict. c. 102; 38 & 39 Vict. c. 33; 41 & 42 Vict. cc. 32, 37; 42 & 43 Vict. cc. 68, 69; 53 & 54 Vict. c. 66; 56 & 57 Vict. c. 55.

Buildings.—18 & 19 Vict. c. 122; 23 & 24 Vict. c. 52; 24 & 25 Vict. c. 87; 32 & 33 Vict. c. 82; 34 & 35 Vict. c. 39; 45 & 46 Vict. c. 14; 48 & 49 Vict. c. 33; 51 & 52 Vict. c. 52; 57 & 58 Vict. c. ccxiii.

Burials.—15 & 16 Vict. c. 85; 16 & 17 Vict. c. 134; 20 & 21 Vict. cc. 35, 81.

Coal Duties (*Abolition of*).—52 & 53 Vict. c. 17.

Coal (*Sale of*).—52 & 53 Vict. c. 21.

Dancing and Music.—57 & 58 Vict. c. 15.

Diseases Prevention.—46 & 47 Vict. c. 35.

Equalization of Rates.—57 & 58 Vict. c. 53.

Gas.—23 & 24 Vict. c. 125; 34 & 35 Vict. c. 41.

Open Spaces.—40 & 41 Vict. c. 35; 44 & 45 Vict. c. 34; 45 & 46 Vict. c. 33; 50 & 51 Vict. cc. 17, 34; 51 & 52 Vict. c. 40.

Regulation of Traffic.—30 & 31 Vict. c. 134; 31 & 32 Vict. c. 5; 48 Vict. c. 18; 53 & 54 Vict. c. 66; also (Michael Angelo's Act) 57 Geo. 3, c. xxix.

Relief of Poor.—27 & 28 Vict. c. 116; 28 & 29 Vict. c. 34; 30 & 31 Vict. c. 6; 32 & 33 Vict. c. 63.

Sewers.—18 & 19 Vict. c. 120; 21 & 22 Vict. c. 104; 25 & 26 Vict. c. 102; 53 & 54 Vict. c. 66.

Slaughter Houses.—37 & 38 Vict. c. 67.

Smoke Furnaces.—16 & 17 Vict. c. 128; 18 & 19 Vict. c. 121, s. 43; 19 & 20 Vict. c. 107.

Streets.—57 & 58 Vict. c. ccxiii.

Thames Preservation.—48 & 49 Vict. c. 76.

Unsound Fish.—26 & 27 Vict. c. 117; 37 & 38 Vict. c. 89.

Water.—15 & 16 Vict. c. 84; 34 & 35 Vict. c. 113; 50 & 51 Vict. c. 21.

CHAPTER X.

OF THE LAWS RELATING TO PUBLIC CONVEYANCES.

It has been the policy of the legislature of this country to exercise, over the matter of public conveyances, merely a general supervision, trusting to the enterprise of individuals for providing for the welfare of the public in this particular; and this subject will be considered under three heads, viz. (I.) Stage Coaches, or Hackney Carriages; (II.) Railways; and (III.) Conveyances by Water.

I. *Stage Coaches, or Hackney Carriages.*—The Acts bearing on these, so far as regards the metropolis, will be found enumerated in the note below (*a*); and so far as regards the other parts of England, they are the 2 & 3 Will. IV. c. 120; 3 & 4 Will. IV. c. 48; and 5 & 6 Vict. c. 79; by the first of which Acts, a "stage carriage" is defined to be every carriage, (whatever be its form or construction,) which is drawn by animal power (*b*); and used for the purpose of conveying passengers for hire, to and from any place in Great Britain; and travelling at the rate of three miles or more in the hour; and for which separate

(*a*) 1 & 2 Will. 4, c. 22; 6 & 7 Vict. c. 86; 13 & 14 Vict. c. 7; 16 & 17 Vict. cc. 33, 127; 30 & 31 Vict. c. 134; 31 & 32 Vict. c. 5; 32 & 33 Vict. c. 115; and 54 & 55 Vict. c. 76.

(*b*) See (regarding *steam carriages* or *locomotives*) 24 & 25 Vict. c. 70; 28 & 29 Vict. c. 83; 41 & 42 Vict. c. 77, Pt. II.; and 42 & 43 Vict. c. 67; and (regarding *tramway cars*) 33 & 34 Vict. c. 78; 42 & 43 Vict. c. cxciii.

fares shall be charged to separate passengers (*c*). And the Acts provide, that no carriage shall be kept for this purpose, unless the person who keeps it has a licence from the Board of Inland Revenue; which must be yearly renewed, and in respect of which certain duties are made payable (*d*); nor unless there be on the carriage such numbered plates and particulars as are directed by the Acts; and these particulars specify the christian and surname of the proprietor, or of one of the proprietors; the extreme places to which the licence extends; and the greatest number of inside and outside passengers which the carriage may lawfully convey (*e*); and *mail* coaches, in particular, are the subject of further special regulations (*f*). The Acts also impose penalties on those in charge of these carriages, for offences or acts of negligence which militate against the safety or convenience of the public; *e.g.*, driving a stage coach without a licence, or with a defective licence, or without having such plates and particulars as above referred to (*g*); carrying too many passengers, or too much luggage (*h*); intoxication, negligence, or furious driving (*i*); and in short, any misconduct, either in the driver or in the conductor, which shall endanger the safety or the property of any person; and furious driving or racing (whether by a stage carriage or by any other carriage), if attended with any personal injury, is a misdemeanor even by the common law (*k*). And the Acts further provide, that where the driver, conductor, or guard of a stage carriage, who has committed the offence, is not known or cannot be found, the *proprietor*

(*c*) 2 & 3 Will. 4, c. 120, s. 5.

(*d*) Sect. 6; 10 & 11 Vict. c. 42, s. 2; and 32 & 33 Vict. c. 14, s. 7.

(*e*) 2 & 3 Will. 4, c. 120, s. 36; 5 & 6 Vict. c. 79, ss. 11, 13, 14.

(*f*) 2 & 3 Will. 4, c. 120, s. 46; 5 & 6 Vict. c. 79, s. 12.

(*g*) 2 & 3 Will. 4, c. 120, ss. 30—36; 5 & 6 Vict. c. 79, s. 14.

(*h*) 3 & 4 Will. 4, c. 48, ss. 2, 3, 4; 5 & 6 Vict. c. 79, s. 15.

(*i*) 2 & 3 Will. 4, c. 120, s. 48.

(*k*) 24 & 25 Vict. c. 100, s. 35; and see 41 & 42 Vict. c. 77 and (as to *bicycles*, &c.) 51 & 52 Vict. c. 41, s. 85; and (as to *omnibuses*) 52 & 53 Vict. c. 14.

shall be liable to the penalty (*l*); unless he prove (by evidence other than his own testimony), that the offence was committed without his privity or knowledge, and without any benefit therefrom to himself; and that he has used his best endeavours to find out the offending driver, conductor, or guard (*m*).

II. *Railways.*—These are usually constructed (and to some extent regulated) under the provisions of special Acts from time to time passed for the purpose; and in which special Acts are usually incorporated the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20); and in the case of special Acts passed after July, 1863, the Railways Clauses Act, 1863 (26 & 27 Vict. c. 92). But there exist also the following statutes affecting railways in general: 1 & 2 Vict. c. 98; 3 & 4 Vict. c. 97; 5 & 6 Vict. c. 55; 7 & 8 Vict. c. 85; 8 & 9 Vict. c. 96; 9 & 10 Vict. c. 57; 12 & 13 Vict. c. xl.; 13 & 14 Vict. c. xxxiii.; 13 & 14 Vict. c. 83; 14 & 15 Vict. c. 64; 15 & 16 Vict. cap. c.; 17 & 18 Vict. c. 31; 22 & 23 Vict. c. 59; 24 & 25 Vict. c. 97, ss. 35—38; c. 100, ss. 32, 34; 29 & 30 Vict. c. 108; 30 & 31 Vict. c. 127; 31 & 32 Vict. c. 119; 32 & 33 Vict. c. 114; 33 & 34 Vict. c. 19; 34 & 35 Vict. c. 78; 35 & 36 Vict. c. 50; 36 & 37 Vict. cc. 48, 76; 38 & 39 Vict. c. 31; 41 & 42 Vict. c. 20; 42 & 43 Vict. c. 56; 46 & 47 Vict. c. 34; 51 & 52 Vict. c. 25; 52 & 53 Vict. c. 57; 55 & 56 Vict. c. 44; and 57 & 58 Vict. c. 54.

Under these statutes, the general supervision and regulation of all railways is entrusted to the Board of Trade; but by the 36 & 37 Vict. c. 48, s. 10, certain of the powers and duties of the Board of Trade in relation to railways were transferred to the Railway Commissioners appointed under that Act; and this transfer is continued under the

(*l*) 2 & 3 Will. 4, c. 120, s. 49; 6 & 7 Vict. c. 86, s. 35; 12 & 13 Vict. c. 92, s. 22.

(*m*) 2 & 3 Will. 4, c. 120, s. 49.

Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25). Under the provisions of the specified Railway Acts, it is made unlawful to open any railway, or portion of a railway, for the public conveyance of passengers, until one month's notice in writing shall have been given to the Board of Trade of the intention of the company to open the same for traffic; and ten days' notice of the time when the railway will be complete and ready for their inspection must also be given to the Board (*n*); and the Board may postpone the opening of any railway, until satisfied that the public may use the same without danger. And in execution of its general control of railways, the Board orders every railway company to make returns to them of the aggregate traffic in passengers, cattle, and goods; of the occurrence of any serious railway accidents; and of all tolls and rates from time to time levied (*o*); and the Board appoints proper persons as inspectors of railways (*p*). Moreover, every railway company (whether specially called upon to do so or not) must report to the Board of Trade every accident attended with serious personal injury, within forty-eight hours of its occurrence (*q*); and is required to lay before the Board, for its approbation, certified copies of the bye-laws and regulations by which it is governed (*r*): which bye-laws may be either sanctioned or disallowed by the Board at its pleasure; and the Board may direct the attorney-general to proceed against any railway company, for non-compliance with the provisions either of its special Act or of any of the general Acts regulative of railways; or for any unlawful act whatsoever (*s*).

The Railway Acts contain also provisions, regulating the liability of railway companies for neglect or default in the carriage of goods (*t*); authorizing the summary

(*n*) 5 & 6 Vict. c. 55, ss. 4, 5.

(*o*) 3 & 4 Vict. c. 97, s. 3; 5 & 6 Vict. c. 55, s. 8.

(*p*) 3 & 4 Vict. c. 97, s. 5; 7 & 8 Vict. c. 85, s. 15.

(*q*) 5 & 6 Vict. c. 55, s. 7.

(*r*) 3 & 4 Vict. c. 97, ss. 7, 8.

(*s*) 7 & 8 Vict. c. 85, ss. 16—18.

(*t*) 8 & 9 Vict. c. 20, s. 89; 14 & 15 Vict. c. 19, ss. 6, 8, 10; 17 & 18 Vict. c. 31, s. 7; 31 & 32 Vict. c. 129, ss. 14—21.

apprehension and punishment of engine-drivers, and other servants of the company, guilty of any misconduct (*u*); and subjecting to punishment all ill-disposed persons obstructing or injuring any railway engine or carriage, or endangering the safety of the passengers (*x*). And, under the particular provisions of the Acts, railway companies (amongst other obligations) are required to maintain and keep in repair good and sufficient fences along their lines (*y*); to transport, at a settled rate, military and police forces (*z*), and mails (*a*); to afford all reasonable facilities for the conveyance of traffic, without any undue preference of particular persons or companies, or of particular descriptions of traffic (*b*); to permit and facilitate the introduction of electric telegraphs upon their lines (*c*); to keep accounts of the money received for the conveyance of passengers, or from other sources, upon their respective lines, and to deliver copies of such accounts to the Board of Inland Revenue; and to pay a monthly duty on their receipts (*d*).

By one of the statutes above mentioned, viz., 7 & 8 Vict. c. 85, it was provided, that if,—at any time after twenty-one years from the passing of the special Act for any passenger railway established after the year 1844,—the average divisible profits for three successive years, upon the paid-up capital stock of such passenger railway company, should be found to equal or exceed 10*l.* per cent., the Lords of the Treasury should be at liberty, (an Act of Parliament being first obtained for that purpose,) to revise and reduce the fares, upon condition of giving the company a guarantee to make good their profits to the amount of 10*l.* per cent. during the existence of such reduced scale; or the Treasury might purchase the railway, whatever might be

(*u*) 3 & 4 Vict. c. 97, ss. 13, 14; 5 & 6 Vict. c. 55, ss. 17, 18.

(*x*) 24 & 25 Vict. c. 97, ss. 35—38; c. 100, ss. 32—34.

(*y*) 5 & 6 Vict. c. 55, s. 10.

(*z*) Sect. 20; 7 & 8 Vict. c. 85, s. 12; 46 & 47 Vict. c. 34, s. 6.

(*a*) 1 & 2 Vict. c. 98; 7 & 8 Vict. c. 85, s. 11.

(*b*) 17 & 18 Vict. c. 31, ss. 1—6.

(*c*) 7 & 8 Vict. c. 85, ss. 14, 15.

(*d*) 5 & 6 Vict. c. 79, s. 4; 10 & 11 Vict. c. 42.

the rate of divisible profits earned thereon (*e*); and this right of purchase was subsequently extended to the electric telegraphs (*f*); and the Act also required railway companies in general to secure, to the poorer class of travellers, the means of travelling by cheap trains, *i. e.* at moderate fares, and in carriages protected from the weather (*g*).

The Act 7 & 8 Vict. c. 85 also prohibited railway companies from raising loans for the future on negotiable securities, except as authorized by parliamentary enactment (*h*); and the 8 & 9 Vict. c. 16, ss. 38—55, as amended by the 28 & 29 Vict. c. 78, and 33 & 34 Vict. c. 20, contains numerous regulations with regard to railway companies borrowing money on bond or mortgage (*i*); and provision has been made, by the 30 & 31 Vict. c. 127, with regard to the financial arrangements of insolvent railway companies, as well for the protection of their creditors on the one hand, as also for the protection of their shareholders on the other (*k*); and the Act 31 & 32 Vict. c. 119, which deals with the accounts of railway companies, provides for the protection of the shareholders, by inspection of such accounts, and by a proper system of audits.

The Act 31 & 32 Vict. c. 119 contains also provisions for securing the safety and comfort of the public, and (among others) this important regulation, that in every passenger train which travels more than twenty miles without stopping, there shall be provided such sufficient means of communication, between the passengers and the servants of the company in charge of the train, as the Board of Trade shall approve (*l*).

(*e*) 7 & 8 Vict. c. 85, ss. 1—4.

(*f*) 31 & 32 Vict. c. 110.

(*g*) The fare for third-class passengers, by these cheap or *government* trains, is not to exceed *one penny* per mile (21 & 22 Vict. c. 75; 23 & 24 Vict. c. 41; 46 & 47 Vict. c. 34, s. 3).

(*h*) 7 & 8 Vict. c. 85, s. 19.

(*i*) Prince *v.* Great Western Railway Company, 16 Mee. & W. 244.

(*k*) In re Potteries, Shrewsbury and North Wales Railway Company, Law Rep., 5 Ch. App. 67.

(*l*) 31 & 32 Vict. c. 119, s. 22.

III. *Conveyances by Water*,—that is to say, the carriage of passengers in merchant ships generally, and being either steamers or sailing vessels,—particular rivers (*e.g.*, the Thames) having their own particular regulations (*m*).

Firstly, as to *Steamers*.—The Merchant Shipping Act, 1894, continuing the like provisions contained in the earlier Acts referred to in the chapter on Navigation (*n*), provides, that every "passenger steamer,"—being any "British "steam-ship carrying passengers to, from, or between any "place or places in the United Kingdom (excepting steam "ferry-boats working in chains, commonly called steam "bridges), or any foreign steam-ship carrying passengers "between places in the United Kingdom" (*o*),—which shall carry a greater number of passengers than twelve, shall be surveyed by, and reported upon to, the Board of Trade at least once in every year (*p*); and shall proceed on no voyage with passengers, unless the owner or master has received from the Board a certificate applicable to the voyage, and showing that the provisions of the Act have been complied with (*q*); and in case the captain or person in charge receives on board any number of passengers greater than the number allowed by the certificate, the owner or master is made liable to pecuniary penalties. And the master of every such ship carrying passengers between places in the United Kingdom shall, when navigating within the limits of any district for which pilots are licensed, (unless he or his mate has a certificate enabling him to conduct the vessel himself,) employ a qualified pilot; and, if he fails to do so, he is liable to a penalty not exceeding 100*l.* (*r*). And we have seen, on p. 169, *supra*, that the masters of all foreign-going vessels and of home-trade passenger ships must

(*m*) 2 & 3 Philip & Mary, c. 16; 22 & 23 Vict. c. xxxiii.

(*n*) See also the Chinese Passengers Act, 1855, 18 & 19 Vict. c. 104.

(*o*) 57 & 58 Vict. c. 60, s. 267.

(*p*) Ibid., s. 271.

(*q*) Ibid.

(*r*) Ibid., s. 604; "The Hanna," Law Rep., 1 Adm. & Ecc. 283.

have either the certificate of competency or of service there mentioned; and wherever such certificate is necessary, then the vessel or ship, if a steamer, is to have also on board a certificated engineer or engineers.

Secondly, as to *Passenger Ships generally*, otherwise called *Emigrant Ships*.—The Passengers Acts, 1855, 1863, 1872, and 1876 (being respectively the 18 & 19 Vict. c. 119, 26 & 27 Vict. c. 51, 35 & 36 Vict. c. 73, and 39 & 40 Vict. c. 80), extended to every sea-going vessel, whether British or foreign, which carried more than *fifty* passengers (*s*), from the United Kingdom to any place out of Europe, and not being within the Mediterranean Sea (*t*); and the execution of the Acts was committed to "the Board of Trade" (*u*), or, in her Majesty's possessions abroad, to the officers there specially appointed for the purpose, and (in their absence) to the chief customs officer of the place (*x*). But all the specified Acts (save some few sections of the Act of 1872) have now been repealed, and their provisions re-enacted with amendments, by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60). And the last-mentioned Act, after defining an *emigrant ship* as "every sea-going ship, whether British or foreign, and whether or not conveying mails, carrying" (*scil.*, upon foreign voyages) "more than *fifty* steerage passengers" (or more such passengers than according to a certain proportion of the ship's registered tonnage for each statute adult) (*y*),—provides (in effect) as follows, that is to say:—that no such ship (unless it be a duly certificated passenger *steamer*) shall clear out to sea, until duly surveyed and reported seaworthy (*z*); nor until the master shall have obtained, from the proper authority at the port of clearance, a certificate that the requirements of the Act have been duly complied with; and that the ship is seaworthy,

(*s*) 26 & 27 Vict. c. 51, s. 3; 52 & 53 Vict. c. 29.
(*t*) 18 & 19 Vict. c. 119, s. 4.
(*u*) 35 & 36 Vict. c. 73, s. 5.
(*x*) 18 & 19 Vict. c. 119, ss. 8, 9.
(*y*) 57 & 58 Vict. c. 60, s. 268.
(*z*) Ibid., s. 289.

in safe trim, and in all respects fit for her voyage, and her passengers and crew in a fit state to proceed (*a*); nor until the master shall have joined in a bond to the crown in the sum of 2,000*l.* or (where neither the owners nor the charterers reside in the United Kingdom) in the sum of 5,000*l.*, conditioned, *inter alia*, for the seaworthiness of the vessel (*b*). The Act contains also a great many provisions for limiting the number and ensuring the safety and accommodation, health and welfare, of the passengers (*c*),—and for regulating *colonial* voyages, as defined in the Act (*d*); but with regard to vessels plying between ports in Australasia, the governor of the colony from which the vessel proceeds is also authorized to make the proper regulations (*e*). The Act of 1894 further provides, that the master of every ship bringing steerage passengers into the United Kingdom, from any place out of Europe, and not within the Mediterranean Sea, shall, twenty-four hours after arrival, deliver to the proper authority a correct list, under his signature, specifying the names, ages, and callings of all the steerage passengers embarked, and the ports from whence they came; and which of them (if any) have died, (with the supposed cause of death,) or have been born, during the voyage; and if the master shall fail to deliver such list, or it be wilfully false, he incurs a penalty not exceeding 50*l.* (*f*); and if any ship bringing steerage passengers *into* the United Kingdom from any place out of Europe, and not within the Mediterranean Sea, has on board a greater number of steerage passengers than is allowed by the Act for passengers *from* the United Kingdom, the master is liable to a fine not exceeding 10*l.* for every statute adult constituting such excess (*g*).

(*a*) Ibid., s. 314.
(*b*) Ibid., s. 309.
(*c*) Ibid., ss. 291—308.
(*d*) Ibid., s. 366.
(*e*) Ibid., s. 367.
(*f*) Ibid., s. 336.
(*g*) Ibid., s. 337.

CHAPTER XI.

OF THE LAWS RELATING TO THE PRESS.

The law of copyright in books, newspapers, pamphlets, &c., having been already discussed, we are now to consider the law relating to printers and publishers generally, and to the press. For the press is a mighty engine for good or for evil, according as it is used; and therefore, from its very nature, it requires to be kept under due restraint; and there existed in this country a censorship of the press from the time of Henry VIII.,—a censorship which was exercised originally in the Court of Star Chamber. And when that court was abolished, in 1641, the like jurisdiction was repeatedly exercised by the Long Parliament, and notably in the years 1643, 1647, 1649, and 1652 (*a*). After the Restoration, in 1660, the censorship was regulated and continued under the 14 Car. II. c. 33; which Act expired in the year 1679, but was revived by 1 Jac. II. c. 17, and afterwards continued by 4 Will. & Mary, c. 24, till the year 1694, since which last-mentioned year this censorship has ceased. And although no censorship has since that year, or is now, exercised in this country over the press, still the press is duly held in check, by certain restrictive provisions, having for their general object to ascertain in every instance the printer and publisher of every book, newspaper, &c.,—so as to make these gentlemen amenable to

(*a*) Scobell, i. 44, 134; ii. 88, 230.

the law wherever the purposes of civil redress or of criminal justice require (*b*).

The restrictive provisions referred to are principally those contained in the 2nd schedule to the Act 32 & 33 Vict. c. 24; which Act repealed a great number of prior Acts, and parts of prior Acts, which were deemed to be hostile to the legitimate freedom of printing (*c*), and re-enacted those portions of such prior Acts which appeared, or were deemed, to impose only reasonable restrictions on the liberty of printing and of the press. The Principal Act 32 & 33 Vict. c. 24 has been itself also amended successively by the 44 & 45 Vict. c. 60, and by the 51 & 52 Vict. c. 64; and the provisions of these three Acts may (as to their general effect) be stated as follows, that is to say:—That every person who shall print any paper for hire or gain shall carefully preserve and keep one copy (at least) of such paper; and shall write or print thereon, in fair and legible characters, the name and place of abode of his employer; and for neglecting to do so, or if he fail to produce the copy to any justice who, within the space of six calendar months, shall demand a sight thereof, he is to incur a penalty, for every such neglect or omission, of 20*l*. And, further, every person who prints any paper or book whatsoever, for publication or dispersion, must print upon the front thereof (if the same be printed upon one side only), or upon the first or last leaf of every paper or book consisting of more than one leaf, in legible characters, his name and usual place of abode or business; and for neglecting to do so, he and every person publishing or dispersing, or assisting in publishing or dispersing, any paper or book printed without such particulars, forfeits, for every copy so printed, a sum not exceeding 5*l*. But in the case of books or papers printed at the University Press of Oxford, or at the Pitt Press of Cambridge, the printer,

(*b*) The Queen *v.* Hicklin, Law Rep., 3 Q. B. 360.

(*c*) 39 Geo. 3, c. 79; 51 Geo. 3, c. 65; 6 & 7 Will. 4, c. 76; 2 & 3 Vict. c. 12; and 9 & 10 Vict. c. 33.

instead of printing his name thereon, is merely to print the following words, "Printed at the University Press, Oxford," or (as the case may be) "Printed at the Pitt Press, Cambridge" (*d*). Also, the above provision with respect to the printer's name and place of abode does not extend to any papers printed by the authority, and for the use, of either House of Parliament (*e*); or to any bank note or security for payment of money; or to any bill of lading, policy of insurance, letter of attorney, deed or agreement, transfer or assignment of public stock or securities, or dividend warrant thereon; or to any receipt for money or goods; or to any proceedings in any court of law or equity. And as regards the penalties imposed by the 32 & 33 Vict. c. 24, no person is to be sued but within three months after the offence; and the action is to be brought in the name of the attorney-general or solicitor-general.

The Act 44 & 45 Vict. c. 60, also provides (by section 8) for a register of the proprietors of newspapers, to be kept by the registrar of joint stock companies; and (by section 7) for the registration in such register of one or more responsible "*representative* proprietors," where the proprietary is numerous; and (by section 9) it is made the duty of all printers and publishers of newspapers, to make returns to the registrar of various particulars,—including the title of the newspaper, and the names and occupations and places of business and of residence of all the proprietors; and for neglect to make such returns, the printer or publisher offending is (by section 10) made liable to a penalty not exceeding 25*l.*; and may be summarily ordered to make the necessary returns; and the penalty is recoverable (by section 16) before any court of summary jurisdiction, in accordance with the Summary Jurisdiction Acts. But by way of affording to honest printers and publishers, who are reasonably careful of what they permit to

(*d*) Bensley *v.* Bignold, 5 B. & A. 335; Marchant *v.* Evans, 2 Moore, 14.

(*e*) 32 & 33 Vict. c. 24, Sched. II., re-enacting 39 Geo. 3, c. 79, s. 28; and 51 Geo. 3, c. 65, s. 3.

appear in the newspapers printed or published by them, it was provided, by the 44 & 45 Vict. c. 50, that newspaper reports of certain meetings should be privileged (section 2); and that no prosecution for a libel contained therein should be commenced without the fiat of the director of criminal prosecutions (section 3),—both which provisions have now been repealed by the 51 & 52 Vict. c. 64; and the 51 & 52 Vict. c. 64, has now enacted more liberally as follows, that is to say:—That a fair and accurate report of any proceedings (not including any blasphemous or indecent part thereof) in courts of justice (section 3); or a fair and accurate report of any public (and certain other) meetings, not including any blasphemous or indecent matter (section 4),—shall be privileged; and that no prosecution for any newspaper libel shall be commenced, without the order of a judge at chambers first had and obtained for the purpose, on due notice to the proposed defendant (section 8). And the Act contains also provisions (in relief of printers and publishers) against vexatious actions and unrighteous damages (sections 5, 6), besides provisions (in favour of public chastity and purity) against the disclosure of any obscene matter contained in any alleged libellous book, newspaper, pamphlet, &c. (section 7).

CHAPTER XII.

OF THE LAWS RELATING TO HOUSES OF PUBLIC RECEPTION AND ENTERTAINMENT.

THE matters which next demand our consideration are the laws which relate to Public Houses and to Theatres.

1. As to *Public Houses*.—The enactments relating to public houses are of two kinds,—the first having in view the subject of *revenue;* and the others having in view the proper *police* regulation of these places, and the prevention of the abuses to which they are peculiarly subject. And as we have in a previous volume already sufficiently discussed such of these enactments as relate to the Revenue or Excise, we will here only mention, that (by one of these enactments) any person selling wine, spirits, beer, cider, or perry, by retail, who shall carry on such trade without an *excise licence*, forfeits for every such offence the sum of 50*l.* (*a*); and we pass on therefore, at once, to consider the enactments which relate to, and provide for, the police regulation of public houses.

Now these last-mentioned enactments commence as early as the reign of Edward the sixth (*b*): but the chief of them, which are now in force, are the 9 Geo. IV. c. 61, "The Intoxicating Liquors (Licensing) Act, 1828;"—the 32 & 33 Vict. c. 27, "The Wine and Beerhouse Act, 1869;"—the 33 & 34 Vict. c. 29, "The Wine and Beerhouse Act

(*a*) 6 Geo. 4, c. 81, s. 26; 7 & 8 Geo. 4, c. 53; 4 & 5 Vict. c. 20; 18 & 19 Vict. c. 38; 23 & 24 Vict. c. 27; and 24 & 25 Vict. c. 91.

(*b*) 5 & 6 Edw. 6, c. 25.

Amendment Act, 1870,"—and the 35 & 36 Vict. c. 94, "The Licensing Act, 1872," as amended by the stats. 37 & 38 Vict. c. 49; 43 & 44 Vict. cc. 6, 20; 45 & 46 Vict. c. 34; 47 & 48 Vict. c. 29; and 49 & 50 Vict. c. 56 (*c*).

Under these Acts, every keeper of an inn, alehouse, or victualling house, wherein is sold wine, spirits, beer, cider, perry, or other exciseable liquors, by retail, to be consumed either *on* or *off the premises*, must, in addition to his excise licence (*d*), obtain a licence from the *justices* having jurisdiction in the place where the house is situate (*e*); and such licence is applied for at the "general annual licensing meeting" held in pursuance of the above statutes; and it was (and is) only refused, in general, for some reasonable objection on the ground of character or otherwise (*f*); but

(*c*) The Act 25 Geo. 2, c. 36 (as amended by 38 & 39 Vict. c. 21), required every house, room, garden, or other place, kept in *London* or *Westminster*, or within a *circuit of twenty miles*, for public dancing, music, or other *public entertainment of the like kind*, "to be licensed by the magistrates at quarter sessions (and under 51 & 52 Vict. c. 41, s. 3, by the London County Council), under the penalty of being deemed (and punishable as) a disorderly house;" and over the doors of such places, there must have been affixed and kept the words "Licensed pursuant to Act of Parliament of the twenty-fifth of King George the second;" and such houses and places were not (as a general rule) allowed to be opened for the purpose of public entertainment before the hour of noon; but the law upon this subject is now contained in the Music and Dancing Licences (Middlesex) Act, 1894 (57 & 58 Vict. c. 15), which came into operation on the 1st January, 1895: and the new Act extends to the whole administrative county of Middlesex, and consolidates the previous Acts, the new superscription to be affixed over the doors of the licensed premises being "Licensed in pursuance of Act of Parliament for" (*dancing*, or whatever else the licence is for). And see 9 Geo. 4, c. 47 (as to packet boats); 5 & 6 Will. 4, c. 39 (as to theatres); 23 & 24 Vict. c. 27 (as to refreshment houses); and 51 & 52 Vict. c. 41, s. 3 (as to race-courses).

(*d*) R. *v.* Drake, 6 Mau. & Sel. 116; R. *v.* Downs, 3 T. R. 560.

(*e*) Prior to the "Licensing Acts" above mentioned, the law as to the sale of "beer, cider, and perry," for consumption *off the premises*, was regulated by 11 Geo. 4 & 1 Will. 4, c. 64; 4 & 5 Will. 4, c. 85; and 3 & 4 Vict. c. 61 (a group of statutes commonly known as the "Beer Acts"); and, under these, no licence from the justices was required, but an *excise* licence only.

(*f*) The Queen *v.* West Riding,

as regards licences for the sale of beer, by retail, for consumption *off the premises*, the licensing justices always had an absolute discretion (*g*); and apparently the grant or renewal of the licence, whether for consumption on or off the premises, is in all cases now to be considered as lying in the absolute discretion of the justices (*h*).

These licences to sell exciseable liquors are granted by the magistrates subject to certain conditions, which have for their object the preservation of sobriety and decorum on the licensed premises; and, still further to promote that object, and with a view also to discouraging unnecessary indulgence in drink generally, it was enacted by "The Tippling Act" (*i*), that no action should be maintained for a debt for spirituous liquors (*scilicet*, consumed on the licensed premises), unless *bonâ fide* contracted at one time to the amount of twenty shillings and upwards; and by 30 & 31 Vict. c. 142, that no action should be maintained for any debt for ale, porter, beer, cider, or perry consumed on the premises where the same was sold or supplied. And with the same objects in view, and by means of the Licensing Acts, the law has subjected public houses and all other places in which any species of intoxicating liquors are sold by retail, whether intended to be consumed *on or off the premises*, to an efficient system of inspection and restraint; and we will now proceed to give some account of these last-mentioned Acts.

The Licensing Acts, 1872 and 1874 (*k*), in the first place, enact, that if any person shall sell or expose for sale any intoxicating liquor without having a licence to sell; or at a place where, by his licence, he is not authorized to sell; he shall be liable, in the case of a first offence, to a penalty

Law Rep., 5 Q. B. 33; The Queen *v.* Pilgrim, ib. 6 Q. B. 89; The Queen *v.* Sykes, 1 Q. B. D. 52.

(*g*) 45 & 46 Vict. c. 34.

(*h*) Sharpe *v.* Wakefield, 22 Q. B. D. 239; The Queen *v.* Scott, ib. 481; Stevens *v.* Green, 23 Q. B. D. 143.

(*i*) 24 Geo. 2, c. 40.

(*k*) 35 & 36 Vict. c. 94; 37 & 38 Vict. c. 49.

not exceeding 50*l.*; or to imprisonment with or without hard labour for not more than one month; and in the case of a second or other subsequent offence, the penalty may be as much as 100*l.*, and the imprisonment rises to three months, and to six months; and on a third conviction, the offender is disqualified from holding a licence (*l*). Also, if any licensed person permits drunkenness, or any violent quarrelsome or riotous conduct on his premises; or sells liquor to a drunken person, or spirits to be drunk on the premises to a child apparently under the age of sixteen; or permits his premises to be used as a brothel; or harbours on his premises a constable on duty; or bribes or attempts to bribe any constable; or suffers gaming or unlawful games to be carried on on his premises—for every such offence—and for some other cognate specified offences against public order—he is liable to a pecuniary penalty; and he is liable also to have the conviction entered, *i. e. recorded on his licence;* and such entry, in the case of two convictions, will cause a forfeiture of his licence; and will disqualify him (if convicted a third time) from afterwards obtaining a fresh licence for the term of five years; and will in some cases prevent even a grant being made to any one, in respect of the same premises, for the space of two years from the date of such third conviction (*m*).

And secondly, the Acts contain stringent regulations, with regard to the *times* during which the sale of intoxicating liquors may be carried on, it being provided, that all premises wherein such liquors are sold by retail, if situate *within the metropolitan district*, (that is to say, in the city of London or the liberties thereof, or any place subject to the jurisdiction of the late Metropolitan Board of Works, or within the four-mile radius from Charing Cross,) must be closed on week days (except Saturdays) from half an hour after midnight until five o'clock on the same morning; and if situated beyond such metropolitan dis-

(*l*) 35 & 36 Vict. c. 94, ss. 3, 4; Re Brown, 3 Q. B. D. 545.

(*m*) See sects. 7, 13, 15, 16, 17, 30, 31; Bew *v.* Harston, 3 Q. B. D. 454.

trict, but in the metropolitan *police* district, (or in a town or place with a population of not less than one thousand, determined to be a "populous place" by the county licensing committee), must be closed between the hours of eleven at night and six on the following morning; and if situated elsewhere, between the hours of ten at night and six on the following morning (*n*). And with regard to Saturday nights and Sundays (including Christmas Day and Good Friday) (*o*), the hours of closing *in the metropolitan district* are on *Saturday night* from midnight until one o'clock in the afternoon of the following Sunday, and on *Sunday* night from eleven o'clock till five on the following morning; in places *beyond* that district, and in the metropolitan police district, or in a "populous place," on Saturday night from eleven o'clock until 12.30 p.m. usually, but sometimes 1 p.m., on the following Sunday, and on Sunday night from ten o'clock until six on the following morning; and if elsewhere, then on Saturday night from ten o'clock until 12.30 p.m. usually, but sometimes 1 p.m., on the following Sunday, and on Sunday night from ten o'clock until six o'clock on the following morning; and all premises, wherever situate, must be closed on Sunday afternoon, from half-past two till six o'clock (*p*). And any person who sells or exposes for sale, or keeps open any premises for the sale of, intoxicating liquors, during the times that such premises should be closed, or who allows during such times intoxicating liquors to be consumed thereon, is rendered liable to a penalty, of 10*l.* for the first and of 20*l.* for any subsequent offence; excepting in the case of *bonâ fide* travellers, or of persons lodging in his house, or (in the case of a railway station) of persons arriving at or departing from such station by the rail (*q*).

(*n*) 37 & 38 Vict. c. 49, ss. 3, 6.

(*o*) Christmas Day and Good Friday are treated as Sundays.

(*p*) By the Sunday Closing (Wales) Act, 1881 (44 & 45 Vict. c. 61), the premises must be closed the whole of Sunday.

(*q*) 37 & 38 Vict. c. 49, ss. 9, 10; Taylor *v.* Humphries, 10 C. B. (N. S.) 429; Coulbert *v.* Troke, 1 Q. B. D. 1.

The Licensing Acts supply also additional safeguards, with regard to the manner in which licences are granted; and for this purpose, the justices in quarter sessions for every county are directed annually to appoint among themselves a *licensing committee*, consisting of not less than three nor more than twelve members (*r*); by whom the grant of all new licences, made at the general annual licensing meeting, must be confirmed (*s*); and analogous provisions are made with regard to borough justices; except that, where there are less than ten acting justices in the borough, the licensing committee is to be a "joint committee," that is to say, is to consist of three of the borough magistrates and three of the magistrates of the county in which the borough is situate (*t*).

In addition to public houses properly so called, the legislature, in the year 1860, sanctioned a distinct class of houses for the refreshment of the public, called "refreshment houses,"—such houses having been for the first time sanctioned by 23 & 24 Vict. c. 27 (amended by 24 & 25 Vict. c. 91, ss. 8—11); and under that Act (as amended), in order to keep a refreshment house, it is necessary to obtain, from the officers of Inland Revenue, an excise licence bearing an excise duty (*u*); and any person licensed to keep a refreshment house, who pursues therein the business of a confectioner, or who keeps open such house for the purpose of selling, to be consumed therein, animal or other victuals, wherewith wine or other fermented liquors are usually drunk, is entitled (subject to the terms

(*r*) The local authority of any licensing district may, on proper cause shown, exempt any licensed person in the immediate neighbourhood of a market, or place where some lawful trade or calling is carried on, from the closing provisions of the Act, save only between the hours of one and two o'clock in the morning (35 & 36 Vict. c. 94, s. 26); and a licensed person may also obtain, from the local authority, an exemption in respect of *special occasions* to be specified in his licence (35 & 36 Vict. c. 94, s. 29).

(*s*) Sect. 37.

(*t*) Sect. 38.

(*u*) 23 & 24 Vict. c. 27, ss. 1, 2, Sched. No. 1.

of the Act) to take out an excise licence to sell wine by retail in such house, to be consumed on the premises (*x*); the excise licence in the case of refreshment houses being now only granted (by force of 32 & 33 Vict. c. 27) on a certificate from the justices, as in other cases of licensed houses. And according to the requirements of the Licensing Act, 1872, no intoxicating liquor may be consumed upon premises licensed as a refreshment house, but not for the sale of any intoxicating liquor, during the hours during which licensed victuallers must keep their houses closed; and the same Act has enacted, as regards refreshment houses *not* licensed for the sale of intoxicating liquors, that the hours during which they may be kept open shall be the same as in the case of licensed victualling and other public houses.

The 23 & 24 Vict. c. 27 also further provided (without reference to refreshment houses), that any person, keeping a shop for the sale of goods and commodities, should be entitled to take out another sort of excise licence, commonly called a "*grocer's licence*," to sell therein wine by retail; in reputed quart or pint bottles only; and not to be consumed in the shop (*y*); but this excise licence also is now only granted on a certificate from the justices (*z*).

2. As to *Theatres*.—The statute 6 & 7 Vict. c. 68, intituled "An Act for regulating Theatres," first repeals the then existing enactments (*a*) as to theatres, and then proceeds to prohibit, under penalties, all persons from having or keeping (*b*) any house or other place of public resort in Great Britain, for the public performance of stage plays (*c*),—unless they shall have either the authority of letters-patent from the crown, or a licence from the

(*x*) 35 & 36 Vict. c. 94, s. 27.

(*y*) 23 & 24 Vict. c. 27, s. 1, Sched. No. 3.

(*z*) 32 & 33 Vict. c. 27, s. 4.

(*a*) 39 Eliz. c. 4; 3 Jac. 1, c. 21; 13 Anne, c. 26; 10 Geo. 2, c. 28; 28 Geo. 3, c. 30.

(*b*) Shelley *v.* Bethell, 12 Q. B. D. 11.

(*c*) Wigan *v.* Strange, Law Rep., 1 C. P. 175; Shelley *v.* Bethell, supra.

lord chamberlain of the household; or else a licence from at least four justices assembled at a special sessions holden for the division wherein the theatre is situate (*d*). And the Act defines the jurisdiction of the lord chamberlain as extending to all theatres, (not being patent theatres,) within the parliamentary boundaries of London and Westminster; and within the boroughs of Finsbury and Marylebone, the Tower Hamlets, Lambeth, and Southwark; and also within all places where the sovereign shall occasionally reside; and defines the jurisdiction of the justices as extending, generally, to all places beyond these limits (*e*); but no licence is to be granted, by either of these authorities, except to the actual and responsible manager of the proposed theatre for the time being; and he is to give security for the due observance of such regulations as the authorities may impose: and no licence from the justices is in force at the Universities of Oxford or Cambridge, or within fourteen miles of the same, without the consent of the chancellor or vice-chancellor of these universities (*f*). And penalties are imposed on any person who, for hire, acts, or causes to be acted, any part of a stage play, in a place (not being a patent theatre) which is not duly licensed (*g*). Moreover, the justices are empowered to make suitable rules for ensuring order and decency in the theatres licensed by them, and for regulating the times when they are to be open; which rules may be rescinded or altered by a secretary of state; and in the case of a riot, or for breach of any regulation in the theatre, the justices may order the same, if licensed by them, to be closed; and the lord chamberlain, as to theatres licensed by him, and also as to patent theatres, may, in the case of a riot or on any public occasion whatever, order the same to be closed (*h*).

(*d*) 6 & 7 Vict. c. 68, s. 2; and see Fredericks *v.* Howie, 1 H. & C. 381; and Fredericks *v.* Payne, ib. 584, as to unlicensed theatres.

(*e*) 6 & 7 Vict. c. 68, s. 3.

(*f*) Sect. 10.

(*g*) 6 & 7 Vict. c. 68, s. 11.

(*h*) Sect. 8.

The Act 6 & 7 Vict. c. 68, has also provided, that one copy of every new stage play,—and, indeed, of every new act, scene, part, prologue, or epilogue of a play,—intended to be acted for hire at any theatre in Great Britain, shall be sent seven days previously to the lord chamberlain for his allowance; and without such allowance, it shall not be lawful to act the same (*i*); and the lord chamberlain may also forbid, under penalties in case of disobedience, the representation or performance of any stage play, or part thereof, in any theatre whatever, whenever such a course shall appear to him advisable, whether for the preservation of good manners or decorum, or with a view to preserve the public peace (*k*).

It will be remembered, that, as stated in an earlier part of this work (*l*), all the business of the justices in respect of the licensing of houses or other places for the public execution of stage plays, has now been transferred, by the Local Government Act, 1888, to the county council for the county or county borough.

(*i*) Sect. 12.
(*k*) Sect. 14.
(*l*) Vide supra, p. 44.

CHAPTER XIII.

OF THE LAWS RELATING TO PROFESSIONS.

In most employments the rewards resulting from success, and the discredit and failure consequent upon incompetency, ensure, in general, that they will not be undertaken without the necessary qualifications; but there are certain professions which (when improperly exercised) are productive of evils so serious as to make it proper to subject them to the restraints of legal regulation; and of these professions, medicine and law are the two to the regulation of which the legislature has principally directed its attention.

I. As to the *Medical Profession*.—The necessity of placing under legal supervision the practitioners both of physic and of surgery was early acknowledged; for we find that, so long ago as the third year of Henry the eighth, it was enacted, that no person within London, or seven miles thereof, should (unless he were a graduate in medicine or surgery of one of the two universities) practise as a physician or surgeon without examination and licence (*a*). And in furtherance of this enactment, and, as regards *physicians*, by royal charter dated the 23rd September, 10 Hen. VIII., and confirmed by the statutes 14 & 15 Hen. VIII. c. 5, and 32 Hen. VIII. c. 40, a college of physicians in London

(*a*) 3 Hen. 8, c. 11.

was established (*b*) ; and it was ordained, that this college should choose four physicians yearly, to supervise all others within London and seven miles thereof, "as also their medicines and receipts;" so that such as offended should be punished with fines, imprisonment, or other means ; and no person was to be at liberty to practise physic or surgery, within that area, except by the licence of the college (*c*) ; and the bishop was originally associated with the faculty for the purpose of this licence. And, as regards *surgeons* (otherwise called at that time *barbers*), the Act 3 Hen. VIII. was amended and added to by the statutes 32 Hen. VIII. c. 42 and 34 & 35 Hen. VIII. c. 8 ; and afterwards by a charter in their favour, bearing date the 15th of August, 5 Car. I., all persons (except such physicians as therein mentioned) were prohibited from exercising, within London and Westminster or within seven miles from London, the profession of *surgeon* for profit ; unless first duly examined and admitted by the "united company of barbers and surgeons of London" ; and ultimately by the statute 18 Geo. II. c. 15, and a charter dated the 22nd of March, 40 Geo. III., and a charter dated the 14th of September, in the seventh year of Victoria, "The Royal College of Surgeons of England" was established in its present constitution. By the last-mentioned charter, a new class of members, called *fellows*, was also created, from and by whom the council of the college was to be in future elected ; and all future examiners were to be elected by, and to hold their office at the pleasure of, the council ; but no bye-law or ordinance thereafter to be made by the council was to be of any force,—until the royal approbation thereof had been

(*b*) The charter of Henry VIII. was subsequently *enlarged* (being at the same time *confirmed*) by the Act 1 Mar. sess. 2, c. 9, and by certain other charters of later dates, viz., the 8th of October, in the fifteenth year of James the first ; and the 26th of March, in the fifteenth year of Charles the second.

(*c*) R. *v.* Askew, 4 Burr. 2186 ; Rose *v.* Physicians' College, 5 Bro. P. C. 553 ; Collins *v.* Carnegie, 1 Ad. & El. 695.

signified to the college, under the hand of a principal secretary of state; or until it had been otherwise approved, in such manner as parliament should direct.

As regards *apothecaries*, this class of medical practitioners first obtained a charter from James the first; which charter was afterwards confirmed and enlarged by the statute 55 Geo. III. c. 194 (commonly called "The Apothecaries Act"); and the Apothecaries Act (which did not, of course, affect the privileges of either of the two universities, or of the College of Physicians, or of the College of Surgeons, or even (further than as was expressed) the privileges of the Society of Apothecaries) (*d*), has been itself recently amended, in some material respects, by the Apothecaries Act Amendment Act, 1874 (*e*). And the general effect of the charter and Acts is, that no person shall practise as an apothecary, or act as an assistant to an apothecary, in any part of England or Wales, unless he shall, after being duly examined, have received a certificate, of his being duly qualified in that behalf, from the "Society of the Art and Mystery of Apothecaries of the City of London;" and it is provided, that such a certificate shall not be granted to any person below the age of twenty-one (*f*); nor to any but such as have served an apprenticeship of five years to some apothecary, and who can produce testimonials of sufficient medical education and good moral conduct: and any person practising without a certificate is not only disabled from recovering his charges (*g*), but is also made liable to a penalty of 20*l.* for every offence (*h*). Power is also given to the society, to strike off from the list of their licentiates any person who shall be

(*d*) The Apothecaries' Company *v.* Warburton, 3 B. & Ald. 40.

(*e*) 37 & 38 Vict. c. 34.

(*f*) As to the certificate, see Young *v.* Geiger, 6 C. B. 541.

(*g*) 55 Geo. 3, c. 194, s. 21; Leman *v.* Fletcher, Law Rep., 8 Q. B. 319.

(*h*) Sect. 20; Brown *v.* Robinson, 1 Car. & P. 264; The Apothecaries' Company *v.* Greenwood, 2 B. & Adol. 709.

convicted of any crime, or who, after due inquiry by the "general council" of medical education, (presently to be mentioned,) shall be judged to have been guilty of infamous conduct in any professional respect (*i*). And any licentiate refusing to compound or sell, or negligently compounding or selling, any medicines as directed by any prescription or order signed with the initials of any physician lawfully licensed, incurs certain penalties (*k*). And, further, the society of apothecaries—or any two or more qualified persons by them appointed—may at all reasonable times in the daytime enter any apothecary's shop, and examine whether the medicines and drugs there kept be wholesome, and may destroy such as they find otherwise, and report the names of the offenders; who are made thereupon liable to a fine of 5*l.* for the first, 10*l.* for the second, and 20*l.* for the third offence (*l*). But the Apothecaries Act did not extend (*m*) to the business of a *chemist and druggist*, with reference to the buying, preparing, compounding, dispensing (*n*), and vending of drugs, medicines, and medicinable compounds, wholesale and retail. However, by the Acts 15 & 16 Vict. c. 56; 31 & 32 Vict. c. 121; and 32 & 33 Vict. c. 117, no person may now assume the title of a chemist or druggist, or sell by retail (or compound) the *poisons* specified in the Acts, unless he has been examined, and has obtained a certificate, and been placed on the register, of the "Pharmaceutical Society of Great Britain." And the Acts last mentioned contain also provisions with regard to the sale of poisons *generally;* requiring them to be distinctly labelled as such, and with the name and address of the seller (*o*); and the sale of *arsenic* in particular (unless when supplied wholesale or on a medical prescription) is subject, under the 14 & 15 Vict. c. 13, to certain special rules, which require certain par-

(*i*) 37 & 38 Vict. c. 34, s. 4.
(*k*) 55 Geo. 3, c. 194, s. 5.
(*l*) Sect. 3.
(*m*) Sect. 28.
(*n*) Apothecaries' Company *v.* Burt, 5 Exch. 363.
(*o*) Perry *v.* Henderson, Law Rep., 5 Q. B. 296.

ticulars to be signed by the purchaser, these particulars stating (among other things) the purpose for which the arsenic is required; and where the purchaser is unknown to the vendor, the sale must also be in the presence of some common acquaintance; and the arsenic must, in general, be coloured with an *admixture of indigo or soot.*

Such were the different charters and statutes by which the medical profession in England, in its various branches, was principally governed till the year 1858, when the Medical Act, 1858 (21 & 22 Vict. c. 90), was passed; which Act has since been amended by a variety of Acts, including the 22 Vict. c. 21; 23 & 24 Vict. cc. 7, 66; 25 & 26 Vict. c. 91; 38 & 39 Vict. c. 43; 39 & 40 Vict. cc. 40, 41; and more particularly by the Medical Act, 1886 (49 & 50 Vict. c. 48); and of the provisions of these Acts some account must now be given.

By these Acts, then, a "general council" of medical education and registration of the United Kingdom is established as a body corporate, with a perpetual succession and a common seal, and with capacity to hold lands for the purposes of the Acts (*p*); and such council consists of twenty members chosen from time to time by (one such member being chosen by each of) certain colleges, universities, and bodies—including the Royal College of Physicians of London, the Royal College of Surgeons of England, and the Apothecaries' Society of London (*q*)—together with five (formerly six) persons nominated by the crown (*r*), and five persons elected from time to time by

(*p*) 25 & 26 Vict. c. 91, s. 1.

(*q*) The other colleges and bodies are the universities of Oxford, Cambridge, London, Durham, Manchester (Victoria University), Edinburgh, Glasgow, Aberdeen, St. Andrews, and Dublin; the Royal University of Ireland; the Royal College of Physicians of Edinburgh; the Royal College of Surgeons of Edinburgh; the Faculty of Physicians and Surgeons of Glasgow; the King's and Queen's College of Physicians in Ireland; the Royal College of Surgeons in Ireland; and the Apothecaries' Hall of Ireland (21 & 22 Vict. c. 90, s. 4; 49 & 50 Vict. c. 48, s. 7).

(*r*) Of these five nominated per-

the registered medical practitioners of the United Kingdom (*s*), and together with a president who is elected by the council itself (*t*); and to this general council is entrusted the duty of carrying out, through the agency of their secretary, a system of registration of all medical practitioners, calculated to insure their addresses and qualifications being generally known,—the registers being (with this object) printed and published, and sold to the public, under the style of "The Medical Register" (*u*).

Upon these registers is entitled to be placed (on payment of a fixed fee) any person who, on the 1st October, 1858, was possessed of any one or more of the qualifications specified in the Medical Act, 1858, and which qualifications extended to (among others) members and licentiates of the medical colleges, and members or graduates of the universities and bodies above specified or referred to; also, any one who thereafter, and prior to the Medical Act, 1886, and whether a male or a female (*v*), became possessed of one or other of such qualifications, or who (subject to the last-mentioned Act) acquired the necessary qualification. But by the Medical Act, 1886, it has now been provided:—That no person shall thereafter be put on the register, in respect of any of the aforesaid qualifications, unless he has passed an examination (called the "qualifying examination") by the Act appointed (*x*), —being an examination in medicine, surgery, and midwifery, held by the examining body in the Act appointed, before inspectors (*y*), and with or without the aid of assistant examiners (*z*). But as regards "colonial" and "foreign" practitioners so called, a separate list in the

sons, three are for England, one for Scotland, and one for Ireland. (49 & 50 Vict. c. 48, s. 7.)

(*s*) Of these five elected persons, three are for England, one for Scotland, and one for Ireland. (Ibid.)

(*t*) 21 & 22 Vict. c. 90, s. 4; 49 & 50 Vict. c. 48, s. 9.

(*u*) 21 & 22 Vict. c. 90, s. 27.

(*v*) 39 & 40 Vict. c. 41.

(*x*) 49 & 50 Vict. c. 48, s. 2.

(*y*) Ibid. s. 3.

(*z*) Ibid. s. 5.

register is assigned for each of these classes of practitioners (*a*); and as regards such colonies and foreign countries as allow the like reciprocal privileges to our own registered medical men (*b*), any person who holds a recognized colonial medical diploma (*c*), or a recognized foreign medical diploma (*d*), and is of good character, and has practised for the period (of ten years) prescribed by the Act in that behalf, may be admitted on the register,—such "recognized diploma" being one which (in the opinion of the general council) sufficiently guarantees the requisite knowledge and skill for the efficient practice of medicine, surgery, and midwifery (*e*). The council, it need hardly be stated, is subject to the supervision of Her Majesty in her Privy Council, as regards its execution of the various duties assigned to it by the Medical Acts (*f*).

Such being the different classes of persons entitled to be registered, the Acts proceed to provide that none other than registered persons shall be entitled to claim the title of legally or duly qualified medical practitioners (*g*); nor to recover any charge in any court of law for any medical or surgical advice or attendance (*h*), or for the performance of any operation, or for any medicine which they have both prescribed and supplied (*i*); nor to hold any of the government or other medical appointments specified in the Act (*j*); nor to sign any certificate required by Act of Parliament to be signed by a medical practitioner (*k*). And any person who wilfully and falsely pretends to be, or takes or uses the name or title of, a physician, doctor, surgeon, general practitioner, apothecary, or any name,

(*a*) 49 & 50 Vict. c. 48, s. 14.
(*b*) Ibid. s. 17.
(*c*) Ibid. s. 11.
(*d*) Ibid. s. 12.
(*e*) Ibid. s. 13.
(*f*) Ibid. s. 19.
(*g*) 21 & 22 Vict. c. 90, s. 34; and see (as to *veterinary* surgeons) 44 & 45 Vict. c. 62.
(*h*) De la Rosa *v.* Prieto, 16 C. B. (N. S.) 578; Leman *v.* Houseley, Law Rep., 10 Q. B. 66.
(*i*) 21 & 22 Vict. c. 90, s. 32; Wright *v.* Greenroyd, 1 B. & S. 758.
(*j*) Sect. 36.
(*k*) Sect. 37.

title, addition, or description, implying that he is registered or recognized by law in such assumed capacity, may be summarily convicted and fined, the fine (which is not to exceed twenty pounds) being paid to the treasurer of the council towards the general expenses of the Acts (*l*). And every person duly registered (and unless and until his name is, for due cause, erased from the register by the council) (*m*) is entitled, according to his qualification, to practise medicine or surgery, or both (as the case may be), in the United Kingdom (*n*), and (subject to any local law) in any of her Majesty's dominions (*o*); and he is also entitled to recover in any court of law, with full costs of suit, reasonable charges for professional aid, advice, and visits, and the costs of any medicines or other medical or surgical appliances by him supplied to his patients (*p*), subject to this qualifying proviso with regard to *physicians*, whose employment (like that of barristers) had always previously been held to be of a merely honorary description and insufficient—unless in virtue of an actual contract (*q*)—to support an action for their fees (*r*), namely, that if he is a fellow (formerly either a fellow or a member) of any college of physicians, the fellows of which (formerly either the fellows or the members of which) are disentitled by bye-law of the college to sue for their fees, then such bye-law may be pleaded in bar to any action commenced for the recovery therof. As regards *surgeons*, they have always been held entitled to recover a reasonable compensation for their services, even in the absence of a special contract (*s*). In addition to the power of

(*l*) Sects. 40, 42, 43; Ellis *v.* Kelly, 6 H. & N. 222.

(*m*) Ex parte La Mert, 4 B. & Smith, 582; Leeson *v.* General Council, 43 Ch. Div. 366.

(*n*) Sect. 21; Turner *v.* Reynall, 14 C. B. (N. S.) 328.

(*o*) 49 & 50 Vict. c. 48, s. 6.

(*p*) Davies *v.* Makuna, 29 Ch. Div. 596.

(*q*) Veitch *v.* Russell, 3 Q. B. 928.

(*r*) Co. Litt. 265, n.; Chorley *v.* Balcot, 4 T. R. 317; Little *v.* Oldaker, 1 Car. & M. 370; Buttersby *v.* Lawrance, ib. 277.

(*s*) Lipscombe *v.* Holmes, 2

recovering their charges thus expressly conferred on registered medical practitioners, they are also exempted, if they so desire, from serving on juries or inquests, or in the militia, or any municipal or parochial office (*t*).

Besides its functions with reference to keeping the register of qualified medical practitioners, the council is also invested with the right, and is under a duty, to lay a representation before the Privy Council, if it finds that any of the bodies entitled by the Acts to hold examinations and to grant medical diplomas, attempts to impose upon any candidate for examination any obligation to adopt, or to refrain from adopting, the practice of any particular theory of medicine or surgery (*u*); and the general council may require information from any such bodies as to the course of study and examination which they require from candidates, and in like manner may represent the case to the Privy Council, if such course of study seems not such as to secure the possession of the requisite knowledge and skill; and the Privy Council may either for a time or altogether deprive such body, so reported, of the power of granting qualifications (*x*). The president of the general council is also constituted the "returning officer" for the purpose of the electing of the five representatives elected by the registered medical practitioners of the United Kingdom (*y*); and such president (saving the rights of the existing president) is to be chosen by the general council from their own number, and is to hold office for a term not exceeding five years (*z*). The Medical Acts also vest in the general medical council the copyright of the "British Pharmacopœia;" and provide for the publication, by the general council, of a new

Camp. 441; Baxter *v.* Gray, 4 Scott, N. R. 374; Simpson *v.* Rolfe, 4 Tyr. 325; Richmond *v.* Coles, 1 Dowl. (N. S.) 560.

(*t*) 21 & 22 Vict. c. 90, s. 35; 33 & 34 Vict. c. 77.

(*u*) 21 & 22 Vict. c. 90, s. 23.

(*x*) Sects. 18—21; 49 & 50 Vict. c. 48, s. 4.

(*y*) 49 & 50 Vict. c. 48, s. 8.

(*z*) Ibid. s. 9.

"British Pharmacopœia." And lastly the Acts provide, that her Majesty may grant to the corporation of the Royal College of Physicians of London a new charter under the name of the "Royal College of Physicians of England," the acceptance of which is to operate as a surrender of all previous charters (except that granted by Henry VIII.), and also of all the privileges conferred by or enjoyed under the 14 & 15 Hen. VIII. c. 5, which shall be inconsistent with such new charter; and they contain also provisions with regard to granting fresh charters to the Royal College of Physicians of Edinburgh, under the name of the "Royal College of Physicians of Scotland," and to "The Royal College of Physicians of Ireland," and to the "Royal College of Surgeons of Scotland."

Before leaving the subject of the medical profession, we must notice the 2 & 3 Will. IV. c. 75 (amended by 34 Vict. c. 16), intituled "An Act for regulating Schools of Anatomy," by which (after abolishing the former practice of the *dissection* of criminals after their execution) it is provided, that the executor or other person having lawful possession of the body of a deceased person,—and not being intrusted with it for interment only,—may permit the body of such person to undergo anatomical examination; unless in his lifetime the deceased shall have expressed, in such manner as in the Act specified, a wish to the contrary; or unless the surviving husband or wife, or other known relation of the deceased, shall object (*a*); and further, that the secretary of state for the home department may grant licences to practise anatomy, to any members of the royal college of physicians or surgeons, or to any graduates or licentiates in medicine, or to any professor or teacher of anatomy, medicine, or surgery, or to any student attending any school of anatomy, the application for such licence being countersigned by two justices of the peace; and persons so licensed may receive or possess

(*a*) The Queen *v.* Feist, 27 L. J., M. C. 164.

for anatomical examination, or examine anatomically, under such licence and with such permission as aforesaid, any dead body; but no anatomical examination is to be conducted, save at some place of which the secretary of state has had a week's notice, and the secretary of state may appoint inspectors for all such places, who are to make quarterly returns, as to the dead bodies carried in for examination there.

And lastly, we must notice the Dentists Act, 1878 (*b*), by which it is provided, that, after the 1st August, 1879, no person shall be entitled to call himself a "*dentist*" or to practise as such (under a penalty), unless he is registered as a dentist; and he can now only be so registered after passing a compulsory examination, and receiving thereupon a certificate of fitness to practise (*c*); but if and when registered, he may so describe himself and so practise; and may also recover his proper fees and charges, these provisions not interfering with any legally qualified medical practitioner (*d*). And the Act provides for the general council, by its registrar, keeping a "dentists' register" (*e*); and the persons entitled to be entered in such register include licentiates, in dental surgery or in dentistry, of any of the medical bodies or universities before mentioned; also, persons *bonâ fide* practising dentistry on the 22nd July, 1878 (when the Act passed), and certain foreign and colonial dentists who may choose to avail themselves of the privileges of the Act (*f*).

II. *As to the Legal Profession.*—We here speak of *solicitors*, not of barristers; and we shall treat of the law relating to solicitors generally (*g*), a name which, since the

(*b*) 41 & 42 Vict. c. 33, amended (in some few particulars) by the Medical Act, 1886 (49 & 50 Vict. c. 48), s. 26.

(*c*) Sect. 18.

(*d*) Sects. 3—5.

(*e*) Sect. 11.

(*f*) Sect. 6.

(*g*) As to *notaries public*, see 41 Geo. 3, c. 79; 6 & 7 Vict. c. 90; 33 & 34 Vict. c. 97, in sched.; 40 & 41 Vict. c. 25, s. 17; The Queen *v.* Scriveners' Company, 3 Q. B. 939.

coming into operation of the Judicature Acts, 1873—1875, includes also *attorneys-at-law* and *proctors* (*h*). Now the law relating to solicitors is (for the most part) contained in the Acts 6 & 7 Vict. c. 73; 7 & 8 Vict. c. 86; 14 & 15 Vict. c. 88; 23 & 24 Vict. c. 127; 33 & 34 Vict. c. 28; 34 & 35 Vict. c. 18; 35 & 36 Vict. c. 81; 37 & 38 Vict. c. 68; 38 & 39 Vict. c. 79; 39 & 40 Vict. c. 66; 40 & 41 Vict. c. 25; 44 & 45 Vict. c. 44; 51 & 52 Vict. c. 65; and 57 & 58 Vict. c. 9 (*i*); and of these statutes the most important are the 6 & 7 Vict. c. 73; 23 & 24 Vict. c. 127; 33 & 34 Vict. c. 28; 40 & 41 Vict. c. 25; and 51 & 52 Vict. c. 65; called respectively the "Solicitors Acts, 1843, 1860, 1870, 1877, and 1888," and the Act 44 & 45 Vict. c. 44, which is called the "Solicitors' Remuneration Act, 1881."

By these statutes, and in particular by the Solicitors Act, 1843, it is enacted, that no person shall act as a solicitor; or as such sue out any writ or process, or commence, carry on, solicit, or defend any action or other proceeding, in the name of any other person, or in his own name, in any court of civil or criminal jurisdiction, or in any court of law or equity in England or Wales,—unless he shall have been admitted, enrolled, and be otherwise duly qualified, to act as a solicitor, either previously to, or else in pursuance of, the Acts (*k*); and any person acting contrary to this enactment is guilty of *contempt of court*, incapable of recovering his fees, and liable to a penalty of 50*l.* (*l*); also, by the County Courts (Costs and Salaries) Act, 1882 (45 & 46 Vict. c. 57), s. 2, no one but a duly qualified solicitor may practise in the county courts (*m*).

(*h*) See note (*g*), ubi sup.

(*i*) See (as to the admission of *colonial* solicitors to practise in England) 20 & 21 Vict. c. 39; 37 & 38 Vict. c. 41; 51 & 52 Vict. c. 65.

(*k*) 6 & 7 Vict. c. 73, s. 2.

(*l*) Ex parte Buchanan, 8 Q. B. 833; In re Walter Simmons, 15 Q. B. D. 348.

(*m*) Reg. *v.* Snagge, (1894) 2 Q. B. 440. Clerks to Guardians need not be solicitors, in order to practise before magistrates (7 & 8 Vict. c. 101, s. 68); also, mere copying work, or engrossing, is not solicitors' work. (Incorporated Law Society *v.* Waterlow, 8 App. Ca. 407.)

To entitle a person to be admitted and enrolled as a solicitor, it is, in the first place, required of him in general that (having been previously duly *articled* (*n*) to some practising solicitor (or firm of solicitors) (*o*) in England or Wales) he shall have actually served him as clerk for *five* years (*p*); but a service of *four* years will suffice, if the candidate shall have passed certain prescribed examinations at Oxford, Cambridge, Dublin, Durham, or London, or at the Queen's University in Ireland, or in any of the universities in Scotland, or in any other university, college, or educational institution, which shall be specified in that behalf in accordance with 40 & 41 Vict. c. 25, s. 13 (*q*); and a service of *three* years only is required, if he shall have taken a degree (after such examination and under such circumstances as are mentioned in the Acts) at any of the above Universities (*r*); or if he shall have been admitted to the degree of a barrister (*s*); or shall have been, for the term of ten years, a clerk to some practising solicitor or proctor (*t*); or if he shall have been admitted and enrolled as a writer to the Signet, or as a solicitor in the Supreme Courts of Scotland, or as a procurator before any of the sheriff's courts (*u*); and under the Solicitors Act, 1877 (40 & 41 Vict. c. 25), s. 12, a barrister of five years' standing may, without any period of service, pass the final examination and be admitted as a solicitor,—provided he has procured himself to be disbarred with that intention;

(*n*) The *articles* must be registered with the Society as Registrar of Solicitors (51 & 52 Vict. c. 65, s. 7); and if not registered within six months of their date, they may be registered subsequently; but in that case, the service under them dates from the date of registration (sect. 7); also, *fresh* articles (under Solicitors Act, 1843, s. 13), where there are any such, must be registered. (Sect. 9.)

(*o*) In re Holland, Law Rep., 7 Q. B. 297.

(*p*) Ex parte Moses, Law Rep., 9 Q. B. 1.

(*q*) See Reg. dated 5th December, 1877; 23 & 24 Vict. c. 127, s. 5; Ex parte Bridford, 1 E. & E. 417.

(*r*) Sect. 2, repealing 6 & 7 Vict. c. 73, s. 7.

(*s*) 23 & 24 Vict. c. 127, s. 3.

(*t*) Ibid. s. 4; In re Sherry, Law Rep., 3 Q. B. 164.

(*u*) 23 & 24 Vict. c. 127, s. 15.

and has obtained the certificate of two benchers of his Inn, that he is fit to practise as a solicitor.

And in order to the clerk's admission and enrolment as a solicitor, it is, in the next place, required of him, that, in addition to and subsequently to such service, he shall have passed a certain examination, called his *final examination*,—touching his articles and service, and his fitness and capacity to practise and to be an officer of the Supreme Court (*v*); and which examination is conducted by the Incorporated Law Society (*x*).

Upon the competency of the candidate for admission being certified, an oath used to be administered to him to the effect, "that he would truly and honestly demean him-"self in practice," and also the oath of allegiance; and after such oaths, he was "admitted," and his name was duly enrolled,—his admission being first duly written on parchment, and impressed with the proper stamp (*y*); but a simplification in the mode of admission has been effected by the Solicitors Act, 1888 (*z*); which (by sect. 10) has

(*v*) Candidates, before they can be bound under articles of service, must in general pass a *preliminary* examination in general knowledge; and clerks under articles (unless exempted under the 57 & 58 Vict. c. 9, on the ground of having obtained a degree in law at some university) have to pass an *intermediate* examination, to ascertain the progress they have made in their studies; which two examinations (as also the *final* examination), by 40 & 41 Vict. c. 25, are conducted by, and are subject to the regulations of, the Incorporated Law Society (Reg. dated 27 Nov. 1877),—the president of the Queen's Bench Division and the Master of the Rolls having a discretionary jurisdiction as regards the requirements of the society.

(*x*) The provisions of the Solicitors Act, 1843, as to articles and service thereunder, and as to examinations and admissions, &c., do not apply to the officials following, although sometimes called solicitors, namely, the solicitor to the Treasury (as to whom, see 39 & 40 Vict. c. 18); the solicitor to the Customs, to the Excise, to the Post Office, to the Inland Revenue, or any other branch of the revenue; nor to the solicitor of the city of London; nor to the solicitor to the Board of Ordnance, or to the Council of the Admiralty or Navy. (Sect. 47; 23 & 24 Vict. c. 127, s. 16.)

(*y*) 40 & 41 Vict. c. 25, Sched. II., Pt. II.

(*z*) 51 & 52 Vict. c. 65.

enacted, that, from and after the 1st February, 1889, a candidate who has obtained from the Society a certificate of having passed his final examination may apply to the Master of the Rolls to be admitted as a solicitor; and thereupon the Master of the Rolls, in the absence of any cause to the contrary, is by writing under his hand to admit the applicant; and (by sect. 11) on production of this admission, and on payment of a fee, not exceeding 5*l.*, to the Society, his name is entered by the Society on the roll of solicitors.

The Solicitors Act, 1843, provided for the appointment of a *Registrar;* whose duty it should be to keep an alphabetical list or roll of all solicitors; and to issue certificates to persons who had been duly admitted and enrolled; and the duties of this office, which were temporarily committed to the "Incorporated Law Society" (*a*), and were afterwards discharged by the Clerk of the Petty Bag, have now been definitely entrusted to the Incorporated Law Society, as the *Registrar* of Solicitors (*b*).

A certificate from the Registrar, of due admission and enrolment, must be produced to the proper authorities, by any person desirous of practising as a solicitor, in order that it may be duly impressed with the proper stamp duty, authorizing him to practise for the ensuing year (*c*); and in order to obtain the Registrar's certificate, a declaration in writing, (signed by the solicitor desirous of practising, or by his partner, or in some cases by his London agent,) containing his name and address, and the date of his

(*a*) 6 & 7 Vict. c. 73, s. 21.

(*b*) 51 & 52 Vict. c. 65, s. 5.

(*c*) 6 & 7 Vict. c. 73, s. 22; 23 & 24 Vict. c. 127, s. 18. The stamp on the *yearly* certificate is regulated by the Stamp Act, 1891 (continuing the like provision contained in the Stamp Act, 1870) as follows:—If the solicitor resides within ten miles from the general post office in the city of London, and shall have been admitted three years, 9*l.* (or if he shall not have been admitted three years, 4*l.* 10*s.*): if he shall reside elsewhere, and shall have been admitted three years, 6*l.* (or if he shall not have been so long admitted, 3*l.*).

admission, must be delivered to the Registrar (*d*). A solicitor who practises in any court, without having a stamped certificate for the current year, is incapable of maintaining any action to recover his professional charges (*e*),—a rule which does not, *semble*, apply to non-litigious business (*f*); but even as regards litigious business, all proceedings taken therein (although by an uncertificated solicitor) hold and remain good as between and against the parties (*g*); and in case the certificate is not renewed yearly, then after the lapse of one year it used not to be renewable, without an order of the Master of the Rolls; but under the Solicitors Act, 1888, s. 16, the Society may as Registrar simply grant a renewal, or (subject to appeal to the Master of the Rolls) refuse to grant a fresh certificate; and in such case the Master of the Rolls may, in his judicial discretion, either refuse to interfere, or may direct a fresh certificate to issue on terms (*h*).

The Solicitors Act, 1843, also contains the following (among other) regulations:—That no solicitor shall have more than two articled clerks at one and the same time; nor any such clerk while he himself acts as a clerk: and that a clerk, articled for five years to a solicitor, may serve one of those years as a pupil with a practising barrister; or with the London agent of the solicitor to whom he is articled (*i*); and that a clerk whose master has died or left off business during the term, or whose articles have been cancelled or

(*d*) 6 & 7 Vict. c. 73, s. 23.

(*e*) Sect. 26; Brunswick *v.* Crowl, 4 Exch. 492; Re Fowler, 4 Q. B. D. 334.

(*f*) Greene *v.* Reece, 8 C. B. 88.

(*g*) Sparling *v.* Brereton, Law Rep., 2 Eq. Ca. 64.

(*h*) Re Chaffers, 15 Q. B. D. 467; 40 & 41 Vict. c. 25, in part re-enacting 23 & 24 Vict. c. 127, s. 23.

(*i*) 6 & 7 Vict. c. 73, s. 6. By 23 & 24 Vict. c. 127, s. 10, the clerk under articles is, with certain excepted cases, restricted (during his term of service) from holding any office, or engaging in any employment, other than that of clerk to his master or partner; but by 37 & 38 Vict. c. 68, s. 4, this restriction is removable, provided the consent in writing of the master be obtained, and the sanction of one of the judges or of the Master of the Rolls.

discharged (*k*), may enter into new articles with another master for the residue of the term (*l*); also, that no solicitor, who is in prison, may, in his own name or in the name of any other solicitor, commence, prosecute, or defend any action or other judicial proceeding, or maintain an action for fees for any such business done during his confinement (*m*).

Let us now turn to solicitors who have been duly admitted, and who have duly taken out their certificate, and duly renewed such certificate annually, and who (being in all other respects duly qualified) are in actual practice; and let us consider the law relating to their work, and to their professional remuneration, and generally to their professional conduct. And here it may be premised that, taken as a whole, there is no body of men in the kingdom who are more highly educated or more industrious than these gentlemen are; or more estimable in their private and in their professional behaviour; and yet the law, jealous of their influence and opportunities, has made them subject to various restrictions, specific and general, having for their object the protection of their clients; but which restrictions are in general so discreetly interpreted by the courts, and by the officials attached to the offices of the courts, as to be in their operation neither galling to the good and able solicitor, nor ineffective to punish the incapable and the evil-intentioned.

And we shall consider, although with great brevity, (I.) The privileges and disabilities of solicitors; (II.) Their retainer, and the duties of their employment; (III.) Their

(*k*) In the event of the master becoming bankrupt, or being imprisoned for debt for twenty-one days, the court may discharge the clerk and assign his articles to a new master (6 & 7 Vict. c. 73, ss. 4, 5; 32 & 33 Vict. c. 62, s. 4); and a proportion of the premium paid, may be (but, in general, is not) recoverable on the death of the master (Ferris *v.* Carr, 28 Ch. Div. 409).

(*l*) 6 & 7 Vict. c. 73, s. 13; Ex parte Wallis, 2 B. & Smith, 416.

(*m*) 6 & 7 Vict. c. 73, s. 31.

bills of costs and remuneration generally; and (IV.) The remedies for and against solicitors, civil and criminal.

I. *The Privileges and Disabilities of Solicitors.*—Solicitors being in actual practice are exempted from serving on juries (*n*); or as parish overseers, churchwardens, constables, and the like (*o*); and generally from all public services of a personal character which might interfere with the due discharge of their professional duties; but whereas formerly a solicitor was incapable of being a county justice (*p*), his disability in this respect has now been taken away, except as regards the county in which he carries on his practice (*q*). Solicitors are entitled to practise as solicitors in the Court of Appeal and in the High Court; and to practise either as solicitors or as advocates, or as both, in the Bankruptcy Division of the High Court (*r*), in the County Courts (*s*), and generally in the Inferior Courts; and they may (subject to payment of a small fee) practise also as solicitors in the Court of the County Palatine of Lancaster (*t*); but their managing clerks may not (in effect) hold their briefs (*u*).

Solicitors are privileged from arrest (where arrest still exists) on civil process, while attending the courts in their capacity of solicitors, and while going to and returning from same (*v*); but they are not privileged from arrest on criminal process (*x*); or under a writ of attachment, or order of committal for contempt (*y*); and they used also to have this further privilege, namely, that of suing and being sued exclusively in the High Court; but this privilege,

(*n*) Jury Act, 1870 (33 & 34 Vict. c. 77, s. 9).

(*o*) 5 & 6 Vict. c. 109, s. 6.

(*p*) 6 & 7 Vict. c. 73, s. 33.

(*q*) 34 & 35 Vict. c. 18.

(*r*) 46 & 47 Vict. c. 52, s. 151; In re Elderton, W. N. 1887, p. 21.

(*s*) 15 & 16 Vict. c. 54, s. 10, repealed (but the privilege continued) by 51 & 52 Vict. c. 43, s. 188.

(*t*) 13 & 14 Vict. c. 43, s. 27.

(*u*) Queen *v.* Oxford County Court, (1894) 2 Q. B. 440.

(*v*) Re Jewitt, 33 Beav. 550.

(*x*) 1 Arch. Practice, 13th ed., pp. 652, 687.

(*y*) Re Freston, 11 Q. B. D. 545; Re Dudley, 12 Q. B. D. 44.

either as to suing (*z*), or as to being sued (*a*), no longer exists.

II. *The Retainer of Solicitors*, and *the Duties of their Employment.*—The solicitor of a party litigant should, as a general rule, obtain from his client a written authority, *i.e.*, a written retainer, to act on his behalf; but a verbal retainer is sufficient (*b*); while, as regards non-contentious business, the retainer is in general implied from the circumstances. The authority may be either a general one, or it may be an authority limited to some particular matter, or to some particular proceeding in the action; and in either case, it must not be exceeded (*c*). But if his authority is general, the contract is an *entire* contract, and the solicitor must accordingly see the business through to its end, at least in general, before he may sue for his remuneration (*d*); also, under this general authority, the solicitor may submit to referring the action; and may even, *semble*, agree to a compromise of it,—unless the client has expressly forbidden a compromise (*e*). This authority used in general to determine with the signing of final judgment in the action (*f*); but now it continues until the conclusion of the whole cause or matter (*g*). A solicitor who commences an action without authority to do so, is personally liable for all the costs thereof (*h*).

In the exercise of his employment, the solicitor must use judgment; and although privileged from disclosing (and bound not to disclose), in general, the communications

(*z*) Blair *v.* Eisler, 21 Q. B. D. 185; 51 & 52 Vict. c. 43, s. 175.

(*a*) Day *v.* Ward, 17 Q. B. D. 703.

(*b*) Wiggins *v.* Peppin, 3 Beav. 403.

(*c*) Spencer *v.* Newton, 6 A. & E. 630; Richardson *v.* Daly, 4 M. & W. 384.

(*d*) Underwood *v.* Lewis, (1894) 2 Q. B. 306.

(*e*) Chown *v.* Parrott, 14 C. B., N. S. 174.

(*f*) Tipping *v.* Johnson, 2 B. & P. 357.

(*g*) De la Pole *v.* Dick, 29 Ch. D. 351; De Mora *v.* Concha, W. N. 1887, p. 194.

(*h*) Schott *v.* Schott, 19 Ch. D. 94; Wray *v.* Kemp, 26 Ch. D. 169.

and documents of his client (*i*), he is not justified in conspiring or combining with him to effect a fraud or a judicial wrong (*j*); but this matter of privileged communications will be more properly considered hereafter in connection with the proceedings in an action (*k*). And as regards all private dealings between a solicitor and his client, *e.g.*, in the case of mortgages taken by the solicitor from his client, the utmost good faith must prevail on the solicitor's part (*l*). In case a solicitor is negligent in the conduct of his client's business, and a loss results therefrom to the client, the solicitor is civilly answerable for the loss (*m*).

III. *Solicitors' Bills of Costs*, and *their Remuneration generally.*—Solicitors as such are entitled to be paid for their professional work; and they may either enter into an agreement with their client as regards their remuneration, or they may dispense with such agreement.

Firstly, where they enter into an agreement:—The agreement is of a special character, and is in the general case governed by the Solicitors Act, 1870, and the Solicitors' Remuneration Act, 1881. Prior to these Acts, a solicitor might, as he still may, agree his past costs, but not costs to be incurred (*n*). A solicitor may, if foolish enough to do so, or if the circumstances of the case persuade him to do so, agree, of course, to charge nothing for his labour (*o*), or to charge costs out of pocket only (*p*), or to charge in the event of success only (*q*), or to look for

(*i*) Reg. *v.* Duchess of Kingston, 11 St. Tr. 246.

(*j*) Reg. *v.* Cox, 14 Q. B. D. 153.

(*k*) Book v. chap. xi. infra.

(*l*) Cockburn *v.* Edwards, 18 Ch. Div. 449; Macleod *v.* Jones, 24 Ch. D. 289; Pooley's Trustee *v.* Whetham, 33 Ch. Div. 111.

(*m*) Whiteman *v.* Hawkins, 4 C. P. Div. 13; Dooby *v.* Watson, 39 Ch. Div. 178.

(*n*) Re Russell, 30 Ch. Div. 114; Jennings *v.* Johnson, L. R., 8 C. P. 425.

(*o*) Ashford *v.* Price, 3 Stark. 185.

(*p*) Jones *v.* Read, 5 A. & E. 529.

(*q*) Turner *v.* Tennant, 10 Jur. 429, n.

costs only to the property to be recovered (*r*); but, as a rule, he makes no such foolish agreement, but enters into a proper agreement under the Acts; and seeing that, if the benefit of the Acts is to be obtained, strict regard must be had to their provisions,—it appears to be as well to state these provisions with some particularity.

(1.) By the Solicitors Act, 1870 (33 & 34 Vict. c. 28), it is provided that an agreement may be validly made between a solicitor and his client respecting the amount and manner of payment for either past or future services; but such agreements (so far as they relate to business in the courts, *i.e.* to contentious business, and the Act of 1870 is now limited to such business) must receive the sanction of a taxing officer of the court which has power to enforce the agreement; that is to say, the amount payable under the agreement is not recoverable until the agreement itself has been allowed by such taxing master (*s*). And no action is to be brought on such agreement (*t*), but questions arising under it are to be determined by the court on motion or petition. Moreover, any provision in such agreement, whereby the solicitor shall not be liable for negligence, or shall be relieved from any responsibility to which he would otherwise be subject, is wholly void; and the agreement, if in any way considered by the courts to be unfair or unreasonable, may be disallowed and set aside. Also, no validity is given by the statute to any purchase by a solicitor of his client's interest in the property involved in the action, or to an arrangement whereby he is to be paid only in the event of the success of the action,—both of which transactions are against the policy of the law (*u*). The agreement must also be in writing, and signed by both the parties to it (*v*); and the interests

(*r*) Re Ingle, 21 Beav. 275.

(*s*) Re Solicitors Act, 1870, 1 Ch. D. 573.

(*t*) Rees *v.* Williams, Law Rep., 10 Exch. 200.

(*u*) Re Solicitors Act, 1870, 1 Ch. D. 573.

(*v*) Re Raven, 30 W. R. 134; Bewley *v.* Atkinson, 13 Ch. D 283.

of third parties are not to be affected thereby. Moreover, the agreement is exclusive of all other claims, unless so far as it expressly excepts any such claims. On the other hand, the Act, as we have seen, enables the solicitor to agree with his client with reference to his future costs (*x*); and it contains an express direction, that on any taxation of costs the taxing officers may have regard to the skill, labour, and responsibility involved in the services rendered (*y*).

(2.) By the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), which limits the operation of the Solicitors Act, 1870, to contentious business, it is provided, as regards non-contentious business (that is to say, business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing), that an agreement may be validly made between a solicitor and his client, before or after or in the course of the business, for the remuneration of the solicitor, as regards both the amount and the manner thereof,—the agreement being in writing and signed by the person to be bound thereby, or by his agent in that behalf; and the agreement is to express whether all or some only (and what) disbursements in respect of searches, travelling expenses, stamps, plans, and the like, are to be included or not in the agreed remuneration. And (by section 4) it is provided, that "the agreement may be sued and recovered on, or impeached and set aside, in the like manner and on the like grounds as an agreement not relating to the remuneration of a solicitor (*z*); and if, under any order for taxation of costs, such agreenent, being relied upon by the solicitor, shall be objected to by the client as unfair or unreasonable, the taxing master or officer of the court may inquire into the facts and certify the same to the court; and if upon such certificate it shall appear to the court or judge, that just cause has been shown either for cancelling the agreement or for reducing the amount payable under

(*x*) Re Lewis, 1 Q. B. D. 724.
(*y*) 33 & 34 Vict. c. 28, s. 18.
(*z*) Re Gray, 30 Sol. Journ. 551.

it, the court or judge shall have power to order such cancellation or reduction, and to give all such directions necessary or proper for the purpose of carrying such order into effect, or otherwise consequential thereon, as to the court or judge may seem fit."

Secondly, where no special agreement as to the solicitor's remuneration has been entered into between a solicitor and his client, either as to contentious business (under the Solicitors Act, 1870), or as to non-contentious business (under the Solicitors' Remuneration Act, 1881),—The amount and manner of his remuneration is governed, as to non-contentious business, by the Solicitors Act, 1843, and the Solicitors' Remuneration Act, 1881, and the rules thereunder; and as to contentious business, is governed by a vast number of statutes, and of orders and rules thereunder; and some short (although necessarily imperfect) statement of the law on these matters must here be made.

And firstly, by the Solicitors Act, 1843 (as regards both contentious and non-contentious business), it is provided, that no solicitor shall (as a general rule) commence an action or sue for his fees or charges in respect of any business done by him, until after the expiration of one calendar month (*a*) after a bill of his costs and charges, signed by him, shall have been delivered to the party to be charged (*b*); and such party may, on the proper application, obtain an order referring the bill for taxation, and staying all proceedings for the recovery of the amount thereof in the meantime; or judgment for the amount to be ascertained on the taxation may (in a proper case) be given (*c*). And by the same Act, the client, or party chargeable with the costs, may have an order made on the

(*a*) In special cases, the judge may otherwise order (38 & 39 Vict. c. 79); *i.e.*, may dispense with this condition precedent.

(*b*) 6 & 7 Vict. c. 73, s. 37; Re Nelson, 30 Ch. D. 1; Re Thompson, 30 Ch. D. 441.

(*c*) Lumley *v.* Brooks, 41 Ch. Div. 323.

solicitor directing him to deliver his bill of costs, when he has not done so; and the same order (or a further order) will direct the solicitor, on payment, to deliver up all deeds, papers, and other documents of the client in his possession touching the matters comprised in the bill of costs (*d*). And even after payment, a bill of costs may, on the ground of special circumstances, *e.g.*, of pressure (*e*) or manifest overcharges (*f*), be ordered to be taxed, provided the application is made within twelve months after payment (*g*). Where any part of the matters comprised in the bill of costs was transacted in any court, *e.g.*, in the courts now constituting the Queen's Bench Division, the taxation would be in that court (*h*); but where no part of the bill related to matters transacted in any court, the taxation was to be in Chancery (*i*); and these distinctions, although technically abolished by the effect of the Judicature Acts (*k*), are practically still in force, and are highly convenient (*l*).

And, secondly, the Solicitors' Remuneration Act, 1881, having (as regards non-contentious business) provided, that the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, and the President of the Incorporated Law Society, and the President of some provincial law society, to be selected by the Lord Chancellor, might (or that any three of them, the Lord Chancellor being one, might) from time to time make any general order for regulating the remuneration of solicitors in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business, not being business in any action (*m*), or

(*d*) 6 & 7 Vict. c. 73, s. 37; Brooks *v.* Bockett, 9 Q. B. 847; Ex parte Cobeldick, 12 Q. B. D. 149.

(*e*) Re Bennett, 8 Beav. 467.

(*f*) Re Thompson, 8 Beav. 237.

(*g*) Sect. 41.

(*h*) Sect. 37.

(*i*) Ibid.

(*k*) Re Worth, 18 Ch. D. 521.

(*l*) Re Pollard, 20 Q. B. Div. 656.

(*m*) Stanford *v.* Roberts, 26 Ch. D. 155.

transacted in any court, or in the chambers of any judge or master, and not being otherwise contentious business (*n*); and having further provided (by sect. 4), that any such general order might, as regards the mode of remuneration, prescribe that it should be according to a scale of rates of commission or percentage, varying or not in different classes of business, or by a gross sum, or by a fixed sum for each document prepared or perused without regard to length, or in any other mode, or partly in one mode, and partly in another or others; and might, as regards the amount of the remuneration, regulate the same with reference to all or any of the following (among other) considerations, namely, the position of the party for whom the solicitor is concerned in any business, that is, whether as vendor or as purchaser, lessor or lessee, mortgagor or mortgagee, and the like; the place, district, and circumstances at or in which the business or part thereof is transacted; the amount of the capital money, or of the rent to which the business relates; the skill, labour, and responsibility involved therein on the part of the solicitor; the number and importance of the documents prepared or perused without regard to length; and the average or ordinary remuneration obtained by solicitors in like business at the date of the passing of the Act; and having also provided (by sect. 5), that any such general order might authorize and regulate the taking by a solicitor from his client of security for future remuneration in accordance with any such order, such remuneration to be ascertained by taxation or otherwise; and might also authorize and regulate the allowance of interest on such remuneration,—A General Order for the regulation of all the above matters has been made, and has been in operation since the 1st January, 1883; and the substance and effect of this order may be roughly stated as follows, that is to say:—As regards non-contentious business (to which alone

(*n*) The Act also provides for the revocation or variation of any such general order. (Sect. 2.)

this Act and the General Order thereunder are applicable), two modes of remuneration are provided, either (1.) By the percentage or commission appointed by Schedule I. to the General Order made under the Act as above mentioned, or (2.) By the old method of remuneration as altered by Schedule II. to that Order; and the solicitor may elect between the two, provided he make his election before entering upon the business; and if he do not so elect, then the former of these two methods of ascertaining his remuneration is the one which becomes applicable (*o*). Schedule I. is sub-divided into two parts, namely, Part I., in respect of sales, purchases, and mortgages; and Part II., in respect of leases, agreements for leases, and conveyances at a rent (not being mining leases, or building leases, or agreements for either); and Schedule II. provides generally for whatever is not covered by either part of Schedule I.; that is to say, for settlements, mining leases or licences and agreements therefor, re-conveyances, transfers of mortgages, and further charges, and generally all other matters of conveyancing (*p*); also, for all matters remaining uncompleted which would (if completed) fall within one or other part of Schedule I. And as regards matters falling within Schedule I., the solicitor's remuneration is to be according to the scale of charges thereby prescribed, and which charges are by way of percentage on the amount of the purchase or mortgage money, or on the rental; and as regards matters falling within Part I. of the schedule, a negotiation fee, also calculated at a percentage on the purchase or mortgage money, is allowed in addition to the proper conveyancing remuneration (*q*); but no such negotiation fee is allowed as regards matters falling within Part II. of that schedule (*r*). As regards the matters regulated by

(*o*) Re Allen, 34 Ch. D. 433; Re Field, 29 Ch. D. 608.

(*p*) Stanford *v.* Roberts, 26 Ch. D. 155.

(*q*) Re Newbould (sub nom. Newbould *v.* Bailward), 14 App. Ca. 1.

(*r*) Re Field, 29 Ch. D. 608; Re Emmanuel, 33 Ch. D. 40; Re Allen, 34 Ch. D. 433.

the old system, as altered by Schedule II., the remuneration is not ascertained by percentage, but in the old way by folio, labour, and the like; and it is a special provision of this schedule, that in special cases the taxing master may, for special reasons, increase or diminish the prescribed allowances; and there is a somewhat similar provision to this, applicable to Schedule I., namely, that in respect of any business which is required to be, and which is, by *special exertion*, carried through in an exceptionally short space of time, the solicitor may be allowed, according to the circumstances, a proper additional remuneration for the special exertion. For a more complete apprehension of the provisions of this General Order, the reader must be referred to the Order itself, and to the scales prescribed thereby, and to the particular rules comprised in the several parts of Schedule I. and in Schedule II.; we shall here add only these two further remarks, namely: Firstly, that the remuneration prescribed by Schedule I. does not include stamps, counsel's fees, auctioneer's or valuer's charges, travelling or hotel expenses, fees paid on searches to public offices, or on registrations, or to stewards of manors, or the like, or any extra work occasioned by changes occurring in the course of the business, *e. g.*, by death, bankruptcy, or the like; and Secondly, that a solicitor may accept from his client, who may give him, security for the amount to become due to the solicitor for business to be transacted by him, and for interest on such amount, but so that interest is not to commence till the amount due is ascertained, either by agreement or taxation; and that a solicitor may charge interest at four per cent. per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from demand from the client; and in cases where such disbursements and costs are payable by an infant, or out of a fund not presently available, such demand may be made on the parent or guardian, or the trustee or other person liable.

And, thirdly (as regards contentious business), where no special agreement as to the solicitor's remuneration therefor has been entered into, the provisions and rules applicable thereto are of too minute and detailed a character to admit of any condensed statement; we can only refer to Order LXV. of the Orders and Rules of 1883; and to the more or less casual references to the costs of litigation in general, and in certain particular kinds or classes of actions, which will be found in our treatment of "Civil Injuries," in Book V. of this treatise.

IV. *The Remedies for and against Solicitors, Civil and Criminal.*—It has already appeared incidentally, that either the solicitor or the client may obtain an order for the taxation of his costs; and such order is, in the ordinary case, obtained on an *ex parte* application; and if the application therefor is made within a year from the delivery of the bill of costs, the order is made as a matter of course, or almost as a matter of course. The order, if made in the Chancery Division, provides also for payment; but the order, if made in the Queen's Bench Division, is merely for taxation. Where the order is not obtainable as of course, it is obtained on a special application by summons, duly served by the applicant upon the other party; and such special application is in general necessary, after the lapse of the year; also, after payment; also, when the retainer is disputed; and generally, when there is any special circumstance affecting more or less the right to payment. The solicitor may also, but is not in general driven to, bring an action for his costs (*s*); and sometimes an action is the only remedy of the client against the solicitor, but this is only in very exceptional cases; for in general, the court exercises over solicitors a very wide summary jurisdiction, on applications intituled in the matter of the

(*s*) Lumley *v.* Brooks, 41 Ch. Div. 323.

solicitor (*t*), and sometimes on applications not so intituled, but of which notice has been duly given to the solicitor (*u*); but it is to be remembered, that this summary jurisdiction is exerciseable only in matters affecting the solicitor as such, *e. g.*, for his personal misconduct, or for any breach or failure of duty as a solicitor (*x*); and in all other cases, an action must be brought against him, if there is any ground of action. The court also exercises a punitive, or disciplinary, jurisdiction over solicitors, when their conduct is of a fraudulent character (*y*); or when they are guilty of any contempt of court (*z*); and the punishment may be by commitment to prison or by attachment; or (in the graver classes of cases) by suspension from practice, or by striking off the rolls (*a*),—the latter punishment not being in general inflicted, save after a report, formerly of the Master, but now of the Incorporated Law Society (*b*), made to the court, after an inquiry into the conduct of the solicitor.

(*t*) Re Ward, 31 Beav. 1; Re Dangar's Trusts, 41 Ch. Div. 178; Swyny *v.* Harland, (1894) 1 Q. B. 707.

(*u*) Slater *v.* Slater, 58 L. T., N. S. 149.

(*x*) Ex parte Edwards, 7 Q. B. Div. 158.

(*y*) Re Dudley, 12 Q. B. D. 44.

(*z*) Re Freston, 11 Q. B. D. 545.

(*a*) Re Hardwick, 12 Q. B. D. 148.

(*b*) 51 & 52 Vict. c. 65, ss. 12, 13.

CHAPTER XIV.

OF THE LAWS RELATING TO BANKS.

The invention of banking appears to be due to the Republic of Venice; where, so early as the year 1171, Jews were accustomed to keep benches in the market-place for the exchange of money and bills; and *banco* being the Italian for *bench*, banks may have taken their denomination from this circumstance. In our own country, the business of banking appears to have been originally carried on chiefly by the goldsmiths; for we find it recited in an Act of the 22 & 23 Car. II. "that several persons, being "*goldsmiths*, and others, by taking up or borrowing great "sums of money, and lending out the same for extraordinary "hire or profit, have gained and acquired to themselves the "reputation and name of *bankers*" (*a*). And at a later date, in the reign of William and Mary, the project was conceived of establishing in England a national institution of the same description with the banks then already established at Genoa and Amsterdam (*b*); and in 1694, an Act was passed sanctioning the creation of that great corporate body, which has since become so celebrated, under the denomination of "The Governor and Company of the Bank of England," or in popular language "The Bank of England"; and many other banks, including private banks and joint-stock banks, have since been

(*a*) Jacob's Dict. in tit. Bankers.

(*b*) Its principal projector was Mr. William Paterson, a Scotch gentleman.

established, not to mention the savings banks which we treated of in a former chapter.

The Act by which the Bank of England was established is the 5 & 6 W. & M. c. 20; by which Act, after empowering their Majesties to incorporate, by letters patent, "The Governor and Company of the Bank of England," and after prohibiting the corporation from buying and selling goods, lest the lieges should be oppressed by their monopolizing or "engrossing any sort of goods, wares, or merchandize" (*c*),—it was provided and declared, that the Bank might deal in bills of exchange, or in buying and selling bullion, gold, or silver, and might sell any goods whatsoever left with it in pledge, and not redeemed at the time agreed upon, or within three months after, and might also sell goods, the produce of lands which it had purchased (*d*): and we find that as a fact, from the time of the passing of the Act or soon afterwards, the Bank began the practice, which it has ever since continued, of issuing its own notes (*e*). And by subsequent Acts it was provided, that no other bank, or company in the nature of a bank, should be established by Act of Parliament within this kingdom (*f*); and that it should not be lawful in England for any other corporation (or for more than six persons associated in partnership) to borrow, owe, or to take up any money on their bills or notes, payable on demand, or at less time than six months from the borrowing thereof (*g*); and thereby exclusive privileges, (popularly called the Bank Charter,) were conferred on the Bank of England.

Subject, however, to these exclusive privileges of the Bank of England, as the same were afterwards from time to time modified, the trade of banking has, from its first introduction, been always free, both in London and in the

(*c*) 5 & 6 W. & M. c. 20, s. 27.
(*d*) Sect. 28.
(*e*) The Bank of England *v.* Anderson, 3 Bing. N. C. 653, 654.
(*f*) 8 & 9 Will. 3, c. 20; 15 Geo. 2, c. 13; 35 & 36 Vict. c. 34.
(*g*) 39 & 40 Geo. 3, c. 28.

country; but as regards these country banks, some of them have carried on business, like the Bank of England, as *banks of issue*, that is, have made payments by their own notes; while the other country banks, and all the London banks, have been *banks of mere deposit*, that is, have made payments in cash and Bank of England notes only, and not in notes of their own.

The character of the Bank of England and of its transactions has always maintained an importance far greater than that of any other bank: for while it has carried on the business ordinarily incident to banking, such as taking deposits of money, issuing its own paper, and discounting mercantile bills, it has also been employed as a great engine of state, in paying the interest due to the holders of the public debt, in circulating exchequer bills (*h*), and in accommodating the government with immediate advances, on the credit of deferred funds, and in assisting it generally, in all the great operations of finance. But as regards the Bank's advances to the government, these are now subject to the restrictions imposed by 59 Geo. III. c. 76, whereby it is enacted, in conformity with an earlier regulation in that behalf (*i*), that it shall not be lawful for the Bank to make advances of money to the crown in any manner whatever, without the express and distinct authority of Parliament for that purpose first obtained,—a restriction, however, which does not prohibit the Bank from *purchasing* exchequer bills or other government securities, or from advancing, upon the credit of exchequer bills or of Treasury bills lawfully issued, any money required to make good any quarterly deficiency in the Consolidated Fund (*k*). And in consideration of the services thus rendered, the Bank is favourably regarded by the government, its credit being in general protected

(*h*) 29 & 30 Vict. c. 25; and 40 & 41 c. 2.

(*i*) 5 M. & W. c. 20, s. 30.

(*k*) 59 Geo. 3, c. 19; 29 & 30 Vict. c. 39, s. 12; 40 & 41 Vict. c. 2, s. 13.

in times of crisis (*l*); and, moreover, it is entitled to certain allowances for managing the public debt (*m*).

In the year 1826, the Bank was authorized to extend the circulation of its paper, by establishing banks of its own not under the immediate management of the Bank directors, but which should be carried on by the agents of the Bank, at any place or places in England where such a branch should be established (*n*); and in the same year, and apparently in consideration of this privilege, the Bank relinquished in part its old exclusive privileges, so as to allow (subject to certain conditions) the establishment of other banking companies, to wit, joint-stock banks, not carrying on business within sixty-five miles from London (*o*); but all Bank of England "notes on demand," issued at any of its branch banks, must be made payable in coin at the place where such notes are issued; and though the Bank of England is not liable to pay, at any of its branches, notes not made specially payable at such branch, it is, on the other hand, bound to pay *in London* all notes whether those of the Bank of England itself, or of any of its branches (*p*).

The Bank Charter had been originally limited to determine upon twelve months' notice after 1st August, 1705; but this period was from time to time extended by successive Acts of Parliament, the charter being at the same time variously modified by one or other of such Acts (*q*);

(*l*) In the year 1797, owing to a temporary failure in public credit, and a consequent run upon the Bank, it was deemed necessary to relieve it for a limited period from the necessity of making payments in cash (see 37 Geo. 3, c. 45, continued, by subsequent Acts, until the 1st of May, 1823).

(*m*) 24 & 25 Vict. c. 3 (repealing 48 Geo. 3, c. 4, and 56 Geo. 3, c. 97); 33 & 34 Vict. c. 71; 55 & 56 Vict. c. 48.

(*n*) 7 Geo. 4, c. 46, s. 15.

(*o*) Ibid. ss. 1—4.

(*p*) 3 & 4 Will. 4, c. 98, ss. 4, 6.

(*q*) 3 Geo. 1, c. 8; 15 Geo. 2, c. 13; 24 Geo. 2, c. 4; 4 Geo. 3, c. 25; 21 Geo. 3, c. 60; 39 & 40 Geo. 3, c. 28; 55 Geo. 3, c. 16; 56 Geo. 3, c. 96; 7 Geo. 4, c. 46; 3 & 4 Will. 4, c. 98; 7 & 8 Vict. c. 32.

and in particular, by the 3 & 4 Will. IV. c. 98, it was provided, that after the 1st August, 1834,— unless and until the legislature should otherwise direct,—tender of a Bank of England note (expressed to be payable to bearer on demand) should be a legal tender to the amount therein expressed for all sums above 5*l.*, so long as the Bank continued to pay, on demand, its notes in legal coin; but, of course, such note would not be a legal tender either by the Bank itself or by any of its branches (*r*). And ultimately, in the year 1844, by the Bank Charter Act of that year (7 & 8 Vict. c. 32), great and extensive changes in the law were introduced (*s*), the statute affecting not only the Bank of England, but all banks whatsoever, and its main object being to place the general circulation of the country upon a sounder footing; by subjecting to reasonable restraints the issue of paper money; and by preventing as much as possible those fluctuations in the currency, to which many of our commercial embarrassments have been ascribed; and we shall state shortly the provisions of this Act.

Firstly, then, as to the *Bank of England*.—By the Act of 1844 just referred to, the Bank Charter was continued, being again subjected to modifications; and was made determinable on giving twelve months' notice pursuant to a vote or resolution in that behalf of the House of Commons at any time after the 1st August, 1855 (*t*), and on repayment by the government of certain debts particularized in the Act; and in particular, it was provided, that the issue of Bank of England notes, payable on demand, should thereafter be kept distinct from the general business of the Bank; and that on the 31st August, 1844, the Bank should transfer to its "*issue* department" securities to the value of 14,000,000*l.* (including the debt due to it by the public), and also so much of the gold coin, and gold and silver

(*r*) 3 & 4 Will. 4, c. 98, s. 6.
(*s*) See also 17 & 18 Vict. c. 83, s. 11; and 19 & 20 Vict. c. 20.
(*t*) 7 & 8 Vict. c. 32, s. 27.

bullion (*u*), then held by the Bank, as should not be required by its *banking* department; and thereupon, there should be delivered out of the *issue* department into the *banking* department, such an amount of Bank of England notes as, together with those in circulation, should be equal to the aggregate amount of the securities, coin, and bullion so transferred to the *issue* department; and it was further provided, that the whole amount of the Bank's notes in circulation, (including those delivered to the banking department,) should be deemed to be issued on the credit of such securities, coin, and bullion; that the amount of such securities was not to be increased, but might be diminished and again increased, so as not to exceed in the whole the sum of 14,000,000*l.* (*x*); and after such transfer as just mentioned to its issue department, it was made unlawful for the Governor and Company to issue Bank of England notes, either into its banking department, or to any person whatever, save in exchange for other Bank of England notes, or gold coin, or gold or silver bullion, or securities acquired in the issue department under the provisions of the Act. The Act further required, that an account of the notes issued by the *issue* department, and of the securities, gold coin, and

(*u*) The silver bullion is not to exceed one-fourth of the gold coin and bullion (sect. 3).

(*x*) In the year 1857, a great commercial emergency having arisen, so that the Bank was unable to meet its demands for discounts and advances on approved securities without exceeding the limits prescribed by law, the governor and company of the Bank were informed by Government, that it was prepared to propose to parliament a bill to indemnify them from any such excess; and notes were accordingly issued in exchange for securities beyond the amount limited by law; and parliament afterwards passed an Act (21 & 22 Vict. c. 1) indemnifying the Bank in that respect, and for a short suspension of so much of the Act of 1844 as limited the amount of such securities. A similar crisis had occurred previously in 1847, and occurred again subsequently in the year 1866,—on each of which occasions Government took the same course; but no actual infringement of the law took place on either of these two occasions, as the commercial panic subsided before the Bank had made advances in excess of the legal limits.

gold and silver bullion therein, and also of the capital stocks and deposits, money and securities in the *banking* department, should be transmitted weekly to the Board of Inland Revenue in a prescribed form; and be published by it in the London Gazette; and all persons were declared entitled to demand, from the issue department of the Bank of England, notes in exchange for gold bullion, at the rate of 3*l.* 17*s.* 9*d.* per ounce of standard gold (*y*).

And before leaving the subject of the Bank of England, it should be mentioned, that by the 55 & 56 Vict. c. 48, s. 6,—which section is to be construed as one with the Bank Charter Act, 1844,—the bank's notes issued more than 40 years, and not presented for payment, may be written off as *dead notes*, and treated as if they had never been issued; so that the Bank is thereby enabled to re-issue notes to the amount so written off; but the Bank remains liable, on such dead notes, in case they are presented for payment; and by the seventh section of the same Act, provision is made for the grant of a supplemental charter to the Bank, regulating its internal affairs.

Secondly, as to *Other Banks*.—The Act of 1844 provided, that in future it should not be lawful for any banker to draw, accept, make, or issue any bill or note, or engagement for the payment of money, payable to bearer on demand; or to borrow, owe, or take up any money, on his bills or notes payable to bearer on demand (*z*),—subject only to this proviso, namely, that any banker, who on the 6th May, 1844, was carrying on the business of a banker, and was then already lawfully issuing his own notes, might continue to issue them; though if he should become bankrupt, or cease to carry on the business, or discontinue the issue of notes, either by agreement with the Bank of

(*y*) 7 & 8 Vict. c. 32, s. 4; and (as to stamp duty on Bank of England notes payable on demand) s. 7; and (as to this duty on bankers' notes in general) 9 Geo. 4, c. 23; 17 & 18 Vict. c. 83; 33 & 34 Vict. c. 97; 54 & 55 Vict. c. 39.

(*z*) Att.-Gen. *v.* Birkbeck, 12 Q. B. D. 605.

England, or otherwise, his privilege in this respect was to be at an end, and incapable of revival (*a*). And as regards any banker continuing to issue his own notes by virtue of this proviso, the Act provided, that he should not thereafter have in circulation a greater amount of notes than the average amount which he had circulated before the Act; and further, that if any such banker ceased to issue his own notes, it should be lawful for her Majesty in council to authorize the Bank of England to increase the 14,000,000*l.* of securities in its issue department, in the proportion of two-thirds of the amount so withdrawn from circulation (*b*). The Act of 1844, moreover, provided (*c*), that every banker (except the Bank of England) should on the 1st of January in every year, or within fifteen days after, make a return to the Board of Inland Revenue, of the name, residence, and occupation of every member of the partnership, of the name of the firm, and of the place where the business was carried on; and the board, on or before the 1st of March in every year, is to publish the return in some newspaper circulating in the town or county wherein such banker carries on his business.

Another Act affecting banks (other than the Bank of England) is the Companies Act, 1862 (25 & 26 Vict. c. 89), and which has been amended by subsequent statutes and particularly by the statute 42 & 43 Vict. c. 76. And by these Acts (in addition to their multifarious provisions regarding companies generally, whether banking companies or other companies) it has been specially provided regarding banks:—That no company or association consisting of more than ten persons shall carry on the business of banking,—unless it is registered (either as "limited" or as "unlimited") under the Companies Acts, or unless it has been formed in pursuance of some other Act, or of letters-patent (*d*); also, that a banking company registered

(*a*) Prescott Dimsdale & Co. *v.* Bank of England, (1894) 1 Q. B. 351.

(*b*) 7 & 8 Vict. c. 32, s. 5.

(*c*) Ibid. s. 21.

(*d*) 25 & 26 Vict. c. 89, s. 4.

as "unlimited" may convert itself into a "limited" one, and for that purpose may increase the nominal amount of its capital by increasing the nominal amount of its shares, provided that no part of such increased capital shall be capable of being called up, except in the event and for the purposes of the company being wound up (*e*); also, that a "bank of issue" registered as a limited company shall not be entitled to limited liability in respect *of its notes*, but the members shall as to these continue liable as if it had been registered as unlimited, and in the event of the bank being wound up, if the general assets are insufficient to satisfy the claims of both the note-holders and the general creditors, then the members of the banking company, after satisfying the note-holders, are to be liable to contribute, towards payment of the debts of the general creditors, a sum equal to the amount received by the note-holders out of the general assets of the company, that is to say, out of the funds available for the general creditors as well as for the note-holders (*f*). The Acts have also provided, that once at the least in every year the accounts of every banking company registered after the 15th August, 1879, as a limited company, shall be examined by an auditor or auditors (elected annually by the company, and not being either a director or officer of the bank), by whom a report on the accounts, and on all balance-sheets laid before the company in any general meeting, shall be made to the members (*g*).

Before concluding the subject of Banks, we may refer to the statute 30 & 31 Vict. c. 29, by which it is enacted (sect. 2), that all joint stock banks shall be bound to show their list of shareholders to any registered shareholder; and (sect. 1) that all contracts for the sale of shares in such banks shall be void, unless the contract sets forth the

(*e*) 42 & 43 Vict. c. 76, s. 5.
(*f*) Sect. 6.
(*g*) 42 & 43 Vict. c. 76, s. 7.

shares by their distinguishing numbers in the books of the bank, or (failing such distinguishing numbers) then by the name of the registered proprietor or proprietors of the shares; and we may refer also to the Bankers' Books Evidence Act, 1879 (42 & 43 Vict. c. 11), by which, repealing the earlier Act (39 & 40 Vict. c. 48) on the same subject, it has been provided, in case of banks generally (and including Post Office Savings Banks) (*h*), that a copy of any entry in a banker's book (having been proved to have been examined with the original entry and to be correct) shall, in all legal proceedings, be received as *primâ facie* evidence of such entry, and also of the matters, transactions, and accounts therein recorded; and the court may also, by order, grant any litigant a right to inspect the banking account of any party or person whomsoever, and to make or take copies thereof or extracts therefrom (*i*).

(*h*) 56 & 57 Vict. c. 69, s. 6.

(*i*) Marshfield *v.* Hutchings, 32 Ch. Div. 499; Arnott *v.* Hayes, 36 Ch. Div. 731; Howard *v.* Beall, 23 Q. B. D. 1.

CHAPTER XV.

OF THE LAWS RELATING TO THE REGISTRATION OF BIRTHS AND DEATHS.

THE civil registration of births and deaths, a practice so important in every country, for the authentication of the civil rights of individuals, and for the promotion of many objects connected with the science of political economy, has been now for some considerable time introduced by statute; though another species of registration, called the *ecclesiastical* registration, having reference to baptisms and burials, has been still longer in use among us; and we purpose to advert to each system of registration, beginning with the ecclesiastical as being the more antient one of the two.

I. As to the *ecclesiastical* mode of registration.—This system is said to be coeval with the *Protestant* Church; having been first established by Cromwell, Lord Vicegerent, in the thirtieth year of Henry the eighth, 1538 (*a*). Various enactments for its confirmation were passed in succeeding reigns; and by a canon (*b*) in the time of James the first, still in force, and by several statutes, particularly 52 Geo. III. c. 146, further provisions were made for its regulation; and although the provisions of the statute 52 Geo. III. c. 146 as to registering *marriages* were repealed on the introduction of the civil registration of marriages,—a subject to which we have sufficiently

(*a*) Godolph. Abridg. 144.

(*b*) Canon 70, 1 Jac. 1.

adverted in a preceding volume (*c*),—the provisions of the Act still remain in force as regards the registration of *baptisms* and *burials* (*d*). And the Act provides, that registers of public and private baptisms and burials, solemnized according to the rites of the Established Church, in any parish or chapelry in England, shall be made by the rector, vicar, curate, or other officiating minister of the parish, in books of parchment or durable paper, and that in such books there shall be inscribed,—within seven days at the latest after the ceremony (*e*),—such particulars as in the schedule to the Act set forth (*f*); and, where the baptism or burial is solemnized elsewhere than in the parish church or churchyard by a clergyman not being the rector, vicar, or curate of the parish, he must transmit on that or the following day a certificate of the solemnization of the ceremony, to the minister of the parish, to be entered among the parish registers (*g*); and the books containing such entries are to be carefully preserved by the officiating minister in a dry well-painted iron chest, and are not to be removed therefrom, except for the purpose of making such entries, or for other the specific purposes authorized by the Act (*h*). And an annual copy of the contents of these register books, certified by the minister, is to be transmitted by the churchwardens, by post, to the registrar of the diocese; and the registrar is bound to make a report to the bishop whether he has duly received such copy or not (*i*); and further, the registrar is required to make out alphabetical lists of the entries; and these lists are to be open to public search, at reasonable times, upon payment of certain fees (*k*).

The statute of George III., so far as regards burials, extends only to such burials as are solemnized according

(*c*) Vide sup. vol. II. p. 262.
(*d*) 6 & 7 Will. 4, c. 86, s. 1.
(*e*) 52 Geo. 3, c. 146, s. 3.
(*f*) Sect. 1.
(*g*) Sect. 4.
(*h*) Sect. 5.
(*i*) Sect. 14; 24 & 25 Vict. c. 98, ss. 36, 37; 27 & 28 Vict. c. 47.
(*k*) Sect. 12; Steele *v.* Williams, 8 Exch. 625.

to the rites of the Established Church; but provisions have been since made (*l*) for the registration of such interments as take place in grounds provided under the Burial Acts referred to in a former chapter; and by 27 & 28 Vict. c. 97, and the Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), these or the like provisions have been extended to all burials whatsoever, which take place in any burial-ground in England; the duty (where not otherwise provided for) being thrown on the company, body, or persons to whom the burial-ground belongs; or on the relatives of the deceased; and the register books are directed to be sent from time to time to the registrar of the diocese; and any person who knowingly inserts any false entry in these registers or in the certified copies thereof, or who forges any part thereof, or wilfully destroys or injures the same, or knowingly certifies any fraudulent or defective copy, is guilty of felony; and is liable to penal servitude for life, or not less than five (now three) years; or to imprisonment, with or without hard labour and solitary confinement, to the extent of two years (*m*).

II. As to the *civil* mode of registration.—It was found that, under the ecclesiastical method of registering baptisms and burials, the entries thereby obtained were often both incomplete and inaccurate, and were also otherwise inadequate for the purposes designed, extending only to such births and deaths as were afterwards attended with the proper ceremonies of the Church. Accordingly, as from the year 1836—1837, and in consequence of the report of a committee of the House of Commons appointed in 1833, to consider the general state of parochial registers and the laws relating thereto, a new system of registering births and deaths, wholly independent of, but co-existent with, the ecclesiastical method of registering baptisms and burials, was introduced by the statute 6 & 7 Will. IV.

(*l*) 16 & 17 Vict. c. 134.
(*m*) 24 & 25 Vict. c. 98, ss. 36, 37; 27 & 28 Vict. c. 47; 54 & 55 Vict. c. 69.

c. 86; and by that Act, registration districts were established; and registrars therefor appointed; and various provisions were enacted, as regards the duties of these officers in registering births and deaths; but the provisions now in force as regards these duties are mostly contained in the Births and Deaths Registration Act, 1874 (37 & 38 Vict. c. 88), which repealed the earlier Acts so far as they bore on this matter (*n*).

It is to be understood, then, that under the combined effect of the 6 & 7 Will. IV. c. 86, and the Acts amending the same, every poor law union or parish is divided into registration districts (*o*); each of which is called by a distinct name, and possesses a *Registrar* (*p*); who must be either resident or have a known office therein (*q*); and who may in general act by *deputy* (*r*). The Registrars of each union are subjected to the supervision of their "Superintendent Registrar,"—an office to be filled as of right, (in case of his due qualification and acceptance,) by the clerk to the guardians of the union, during the pleasure of the Registrar-General (*s*),—the Registrar-General being an officer appointed under the Great Seal, and holding office during the pleasure of the crown (*t*), and exercising authority over all Superintendent Registrars; and in fact, it is to him that (subject only to such regulations as may be made by a principal secretary of state) (*u*), the management of the whole system of this registration (where no specific directions are given by the Acts) is entrusted. Provision is also made for the establishment of a proper

(*n*) 6 & 7 Will. 4, c. 86; 7 Will. 4 & 1 Vict. c. 22; 17 & 18 Vict. c. 104; 18 & 19 Vict. c. 119; and 21 & 22 Vict. c. 25.

(*o*) 37 & 38 Vict. c. 88, s. 21.

(*p*) 6 & 7 Will. 4, c. 86, ss. 7, 10, 11; 29 & 30 Vict. c. 113, s. 1.

(*q*) 6 & 7 Will. 4, c. 86, s. 26.

(*r*) Ibid. s. 29.

(*s*) 6 & 7 Will. 4, c. 86, ss. 7, 10, 11; 29 & 30 Vict. c. 113, s. 1; 51 & 52 Vict. c. 41, s. 24, sub-s. 2 (d).

(*t*) 6 & 7 Will. 4, c. 86, s. 2; and (as to the registration of the births and deaths occurring among officers and soldiers of her Majesty's land forces out of the United Kingdom) 42 & 43 Vict. c. 8.

(*u*) 6 & 7 Will. 4, c. 86, s. 5.

office, to be called the "General Register Office"; and of register offices for each union (to be placed under the respective Superintendents);—for the preservation and safe custody of the registers when collected (*x*);—and the Acts also contain regulations as to the uniform construction and durable materials of the *books* wherein the entries are to be made (*y*).

The practical working out of the system depends mainly upon the *Registrars*, who have the following duties to perform:—Firstly, as to *Births*.—Every registrar is authorized and required to inform himself carefully of every birth which shall happen in his district; and to learn and register, as soon after the event as may conveniently be done, such particulars as are required, by the schedule annexed to the 37 & 38 Vict. c. 88, to be registered touching such birth (*z*); and it is the duty of the father and mother of any child born alive,—or, in their default, of the occupier of the house (if he knows of the birth), and of each person present thereat, and of the person having charge of the child—within forty-two days after the day of such birth, to give to the proper registrar information of the particulars required to be registered concerning such birth; and, in his presence, to sign the register (*a*). When a period of three months from the birth of the child has expired, registration may indeed still take place; only, in that case, a solemn declaration before the Superintendent Registrar as to the truth of the particulars required must be made by one of the persons on whom the statute imposes the duty of giving information as to the birth; and he or she must sign the register in the presence both of the Superintendent Registrar and of the registrar of the district (*b*); but after the expiration of twelve months from the time of the birth, no registry thereof can, in the general

(*x*) Sect. 9.
(*y*) Sect. 17.
(*z*) 37 & 38 Vict. c. 88, ss. 4, 18; In re Wintle, Law Rep., 9 Eq. Ca. 373.
(*a*) 37 & 38 Vict. c. 88, s. 1; R. *v.* Price, 11 Ad. & El. 727.
(*b*) Sect. 5.

case, be made; except with the written authority of the Registrar-General, such authority being duly entered on the register (*c*). But births on board a vessel at sea are, of course, exempt from these specific provisions (*d*).

Secondly, As to *Deaths*.—It is the duty of every Registrar to inform himself carefully of every death which happens in his sub-district: and to register such particulars concerning the same as are specified in the schedule annexed to the 37 & 38 Vict. c. 88 (*e*); and it is the duty of the nearest relatives of the deceased present at the death, or in attendance during his last illness; and, in default of such relatives, of any other relative in the same sub-district; and in default of any such persons present at the death, of the occupier of the house (if he knows of such death having taken place); and, in his default, of each inmate of the house, and of the person causing the body to be buried,—to give to the registrar information (within the five days next following the day of death), according to the best of his knowledge and belief, of such particulars as are required to be registered touching the death (*f*); and in the case of an inquest upon the body, such information is to be conveyed to the registrar, by the coroner before whom such inquest is held (*g*).

And four times in every year, each district registrar is to deliver, to his Superintendent, a certified copy of the entries made by him in his registry book,—and finally the register itself, upon the book being filled; and the Superintendent, at the same intervals, is to transmit the same to the Registrar-General (*h*). And the duties of this last-mentioned officer, into whose hands the documents thus ultimately fall, consist,—in addition to the general supervision of the working of the whole system,—in examining, arranging, and indexing the certified copies so sent; and he also compiles abstracts of their contents, and transmits

(*c*) Sect. 5.
(*d*) Sect. 37.
(*e*) 37 & 38 Vict. c. 88, s. 18.
(*f*) Sect. 10.
(*g*) Sect. 16.
(*h*) 6 & 7 Will. 4, c. 86, ss. 32, 34.

the same, once in every year, to a principal secretary of state; by whom such abstracts are afterwards laid before parliament (*i*).

And before we conclude this chapter, we may remark, that at the time of the introduction of the system of *civil* registration above explained, certain commissioners were appointed for inquiring into the state and authenticity of any registers (*other* than parochial) which at that time existed; and they succeeded, in the course of a few years, in discovering about 7,000 such registers which were deemed authentic; and the documents so discovered were, by 3 & 4 Vict. c. 92, placed under the care of the Registrar-General, together with the records of marriages and baptisms theretofore solemnized in the Fleet and King's Bench prisons, and at other irregular places; and by an express provision of the Act, all registers and records deposited in the General Register Office by virtue of the Act (except such registers as are in the Act expressly excepted) of marriages and baptisms at the Fleet and elsewhere,—are deemed to be in legal custody, and receivable in evidence accordingly in all courts of justice (*k*).

(*i*) Sect. 6.

(*k*) 3 & 4 Vict. c. 92, s. 6; 21 & 22 Vict. c. 25, s. 3.

BOOK V.

OF CIVIL INJURIES.

CHAPTER I.

OF THE REDRESS OF INJURIES BY THE MERE ACT OF THE PARTIES.

At the opening of these Commentaries, the objects of municipal law were stated to be the establishment and maintenance of the *rights* severally due to the different members of the community; whence the distribution of our law into two portions,—one relating to *rights*, and the other relating to the violation of rights, *i.e.*, to *wrongs*. And we distinguished *rights* into four kinds, viz.: 1, Personal rights: 2, Rights of property; 3, Rights in private relations; and 4, Public rights; and these have respectively formed the subject of the four preceding Books. We now proceed to the examination of *wrongs*, an inquiry evidently posterior in its nature to the inquiry into *rights*, for wrongs pre-suppose rights, and are in fact the mere privation of rights; and the two subjects stand in the same connection with each other as *jus* with *injuria*, and *fas* with *nefas* (*a*).

Wrongs, as we had also occasion before to remark, are divisible into two sorts,—*civil injuries* and *crimes*. Now

(*a*) 3 Bl. Com. 2.

civil injuries consist in the violation of rights, considered with regard to the injury sustained by the individual, and consequently are fit subjects for *civil redress* or *compensation;* and on the other hand, crimes consist in the violation of rights, when considered with regard to the evil effect of such violation on the community at large, and accordingly are fit subjects for *punishment.* To investigate the first of these species of wrongs, with their appropriate remedies, or modes of redress, will be our employment in the present Book; and the other species will be reserved till the sixth and concluding Book of these Commentaries.

The more effectually to accomplish the redress of civil injuries, courts of justice are instituted in every civilized society; and the remedies for civil injuries are principally to be obtained by application to the courts of justice, *i.e.*, by *action* or *suit.* [But as there are certain injuries of such a nature that some of them permit, and others require, a more speedy remedy than can be had in the ordinary course of justice, there are allowed in those cases certain extra-judicial or eccentrical remedies; and of these we shall first of all treat, before we consider the remedy by action; and, to that end, we shall distribute the redress of private wrongs into three several species—firstly, that which is obtained by the *mere act* of the *parties* themselves; secondly, that which is effected by the *mere act* and operation of *law;* and, thirdly, that which is effectuated only by *action* or other judicial proceeding.

And, first, *Redress by the mere act of the parties.*—This is of two sorts, firstly, that which arises from the act of the injured party only; and, secondly, that which arises from the joint act of both or all the parties together. And of the first sort are:—

I. *Self-defence.*—The *defence* of one's self, or the mutual and reciprocal defence of such as stand in the relations of husband and wife, parent and child, master and servant.—In these cases, if the party himself, or any of these his

[relations, be forcibly attacked in his person or property, it is lawful for him to repel force by force; and any breach of the peace which may happen, is chargeable upon him only who began the affray (*b*). For the law, in this case, respects the passions of mankind; and (when external violence is offered to a man himself, or to those with whom he has a near connection,) makes it lawful in him to do himself that immediate justice, to which he is prompted by nature, and which no prudential motives are strong enough to restrain. Self-defence, therefore, is not, neither can it be in fact, taken away by the law of society; and in the English law particularly, it is held (as we shall see hereafter) to be an excuse for breaches of the peace, nay even for homicide itself, care only being taken, that the resistance does not exceed the bounds of mere defence and prevention; for then the defender would himself become the aggressor (*c*).

II. *Recaption* or *reprisal.*—This may be resorted to when any one hath deprived another of his property in goods, or wrongfully detains his wife, child, or servant; in which cases, the owner of the goods, or the husband, parent, or master, may lawfully claim and retake them, wherever he happens to find them; so it be not in a riotous manner, or with unnecessary violence, or attended with a breach of the peace (*d*). The reason for this is obvious; since it may frequently happen that the owner may have this only opportunity of doing himself justice: his goods may be afterwards conveyed away or destroyed, and his wife, children, or servants, concealed or carried out of his reach, if he had no speedier remedy than the ordinary process of the law; and if, therefore, he can so contrive it as to regain possession without force or terror,

(*b*) 2 Roll. Abr. 546; 1 Hawk. P. C. 131; Bac. Abr. Master and Servant (P).

(*c*) 1 Hale, P. C. 485, 486. Vide post, vol. iv. bk. vi. c. iv.

(*d*) Blades *v.* Higgs, 10 C. B., N. S., 713.

[the law favours and will justify his proceeding. But as the public peace is a superior consideration, this natural right of reception may not be exercised, where the exercise of it would occasion strife and bodily contention, or would endanger the peace of society.] If, for instance, my horse is wrongfully taken away, and I find him on a common, or in a fair, or at a public inn, I may lawfully re-take him into my possession; but if he is in a private stable, or in private grounds, I may not break open the stable or break into the private grounds to take him out; but my only remedy in such latter case is an action to recover the animal or his value, together with damages for his detention (*e*).

III. *Entry.*—[As reception is a remedy given to the party himself, for an injury to his *personal* property, so a remedy of the same kind, for injuries to *real* property, is by *entry* on lands, when another person without any right has taken possession thereof. In such a case, the party entitled may make a formal but peaceable entry on the lands, declaring that thereby he re-takes the possession,—which notorious act of ownership is equivalent to a feodal investiture by the lord; or he may enter on any part of the property, in the name of the whole: but if the estate lies in different counties, he must make different entries; for the notoriety of such entry or claim to the *pares* or freeholders of Westmoreland, is not any notoriety to the *pares* or freeholders of Sussex (*f*). Also, if there be two disseisors, the party disseised must make his entry on both; or if one disseisor has conveyed the lands with livery to two distinct feoffees, entry must be made on both (*g*); for as their seisin is distinct, so also must be the act which divests that seisin. But no entry can in the nature of

(*e*) Higgins *v.* Andrews, 2 Roll. R. 55, 56; Masters and Powlie's case, ib. 208; 2 Roll. Abr. 565, 566; Chilton *v.* Carrington, 15 C. B. 730; 17 & 18 Vict. c. 125, s. 78.

(*f*) Co. Litt. 252 b; 3 Bl. Com. 175.

(*g*) Co. Litt. 252.

[things be made on hereditaments *incorporeal* (*h*); and in every case where this remedy is available, it must be pursued in a peaceable and easy manner; and not with force or strong hand (*i*); for a forcible entry is an indictable offence (*k*); for, if one turns another out of possession forcibly, this amounts to a breach of the peace and is punished accordingly (*l*).

IV. *Abatement.*—A fourth species of remedy by the mere act of the party injured, is when he *abates*, that is, removes, a nuisance. What nuisances are, and their several species, we shall find a more proper place to inquire, under one of our subsequent divisions (*m*); we shall at present only observe, that whatsoever unlawfully annoys or injures another, is a nuisance to him in law: and that such nuisance may be abated, that is, taken away or removed, by the party aggrieved thereby, so as he commit no riot in the doing of it (*n*), nor occasion any damage, beyond what the abatement necessarily requires (*o*). Thus, if a house or wall is erected by my neighbour, so near to mine that it stops my antient lights, I may enter his land and peaceably pull it down (*p*); or if the boughs of his trees are allowed to grow so as to overhang my land, which they had not been accustomed to do, I may, on his refusal, or even on his neglect, to remove such part of them as are in that position, peaceably effect the removal myself (*q*); also, if a new gate be erected across a public highway, any person passing that way may

(*h*) 3 Bl. Com. 206.

(*i*) Newton *v.* Harland, 1 Man. & G. 644; Harvey *v.* Bridges, 14 Mee. & W. 442.

(*k*) Beddall *v.* Maitland, 17 Ch. D. 174; Edwick *v.* Hawkes, 18 Ch. D. 199.

(*l*) 5 Ric. 2, st. 1, c. 7; 15 Rich. 2, c. 2; and 31 Eliz. c. 11; 4 Inst. 176; 21 Jac. 1, c. 15; R. *v.* Wilson, 3 Ad. & Ell. 811; R. *v.* Harland, ib. 826; Lows *v.* Telford, 1 App. Ca. 414.

(*m*) Vide post, c. VIII.

(*n*) 2 Rep. 101; 9 Rep. 55; Houghton *v.* Butler, 4 T. R. 364.

(*o*) Cooper *v.* Marshall, 1 Burr. 261; Lodie *v.* Arnold, 2 Salk. 458.

(*p*) R. *v.* Rosewell, 2 Salk. 459.

(*q*) Norris *v.* Baker, 1 Roll. Rep. 394; Lodie *v.* Arnold, 2 Salk. 458; Lemmon *v.* Webb, (1894) 3 Ch. 1, affirmed in Dom. Proc.

[cut it down and destroy it (*r*). And the reason why the law allows this private and summary method of doing justice is, because injuries of this kind require an immediate remedy; and cannot wait for the slow progress of the ordinary forms of justice.

V. *Distress.*—A fifth way in which the law allows a man to minister redress to himself, is by allowing him to *distrain* the goods of another for non-payment of rent or other duties; or to distrain cattle *damage feasant*, that is, doing damage, or trespassing upon his land,—the former species of distress being intended for the benefit of the landlord, to prevent tenants from secreting or withdrawing their effects to his prejudice; the latter kind arising from the necessity of the thing itself, as it might otherwise be impossible, at a future time, to ascertain whose cattle they were that committed the trespass or damage. And as the law of distress is a subject of great use and consequence, it shall here be considered with some minuteness, by inquiring, first, for what injuries a distress may be taken; secondly, what things may be distrained; and thirdly, the manner of taking, disposing of, and avoiding distresses.

Firstly, the injuries for which a distress may be taken. —The most usual injury is the non-payment of rent. It was observed in a former volume, that distresses were incident, by the common law, to every *rent service*, and, by particular reservation, to *rent charges* also; and that by the statute 4 Geo. II. c. 28, the same remedy was also extended in general to *rents seck*, *rents of assize*, and *chief rents* (*s*). So that we may lay it down as a general rule, that a distress may now be taken for any kind of rent in arrear, the detaining whereof beyond the day of payment is an injury to him that is entitled to receive it (*t*);] and

(*r*) James *v.* Hayward, Cro. Car. 184.

(*s*) Vide sup. vol. I. pp. 618, 621.

(*t*) Bradbury *v.* Wright, 2 Doug. 624; Newman *v.* Anderton, 2 N. R. 224; Giles *v.* Spencer, 3 C. B., N. S. 244; Buttery *v.* Robinson, 3 Bing. 392.

also for any apportioned part of any rent (*u*). And here let us observe, that in a yearly tenancy, in the absence of any express stipulation to the contrary, the rent is not in arrear till *after the expiration* of the year; and so in the case of quarterly, weekly, and other tenancies (*x*). But as it is of the definition of rent, that its amount shall be certain, or at the least be capable of being readily reduced to a certainty, so it is held that where the sum to be paid by the occupier is not fixed by agreement, but depends on what shall be considered as a reasonable compensation for the use and occupation of the premises, no distress for it can legally be made (*y*). [Another injury, for which distresses may be taken, is where a man finds a stranger's beasts wandering in his grounds, *damage feasant;* that is, doing him hurt or damage, by treading down his grass or the like: in which case, supposing the trespass not to be rendered excusable by the defective state of his own fences, or the like (*z*), the owner of the soil may distrain them, while they so remain on his grounds, till satisfaction be made him for the injury he has thereby sustained; and apparently, if he so distrain, he cannot, while he holds the distress, also sue for the damage (*a*); and it is said, that this remedy by distress extends also to inanimate things doing damage (*b*). There are, moreover, other kinds of distresses introduced, in special cases, for the recovery of duties and penalties imposed by Act of Parliament (*c*); and there is also a right of distress for a neglect to do suit in the lord's

(*u*) Rivis *v.* Watson, 5 Mee. & W. 255.

(*x*) Collett *v.* Curling, 10 Q. B. 785.

(*y*) Regnart *v.* Porter, 7 Bing. 451; Warner *v.* Pochett, 3 B. & Adol. 928; Dunk *v.* Hunter, 5 B. & Ald. 322.

(*z*) 2 Wms. Saund. 284 e, n. (4).

(*a*) Boden *v.* Roscoe, (1894) 1 Q. B. 608.

(*b*) Ambergate, &c. Railway Company *v.* Midland Railway Company, 2 Ell. & Bl. 793.

(*c*) For example, for the assessments made by commissioners of sewers (7 Ann. c. 33; 24 & 25 Vict. c. 133, s. 38); or for the relief of the poor (43 Eliz. c. 2; 17 Geo. 2, c. 38, s. 7; 4 & 5 Will. 4, c. 76, s. 49).

[court, or to pay amercements legally imposed by a court leet or court baron (*d*).

Secondly: The things which may be taken in distress.—We may lay it down as a general rule, that all chattels personal may be taken, unless particularly protected or exempted. Instead, therefore, of mentioning what things are distrainable, it will be easier to enumerate those which are not so, with the reason of the exemption (*e*). And, 1. Articles and things which were formerly considered as having no intrinsic value, or wherein a man could have no absolute property, (as dogs, cats, rabbits, and the like, and all animals *ferœ naturæ*,) are exempted from distress; but if deer are kept in a private inclosure for the purpose of sale or profit, this so far changes their nature, by reducing them to a kind of stock or merchandize, that they may be distrained for rent (*f*). 2. Whatever is in the personal use or occupation of any man, is for the time privileged from distress, in order to prevent the danger, which might otherwise arise, of a breach of the peace (*g*); as, for example, an axe with which a man is cutting wood, or a horse while a man is riding him. 3. Things delivered to a person following a public trade, to be carried, wrought, or managed in the way of such his trade, are exempted from distress (*h*); as a horse sent to a smith to be shoed, or standing in a common inn; or cloth in a tailor's house (*i*); or corn sent to a mill or market; or goods sent to an auctioneer to be sold (*k*);] which exemption is for the

(*d*) Co. Litt. 96; 2 Wms. Saund. 168, n. (1); Bro. Abr. in tit. Distresses, 15; Scriven on Copyholds, 6th ed., by Brown, pp. 204—228.

(*e*) Co. Litt. 47.

(*f*) Davies *v.* Powel, C. B. Hil. 11 Geo. 2; Willes, 47.

(*g*) Storey *v.* Robinson, 6 T. R. 138; Field *v.* Adames, 12 Ad. & El. 649.

(*h*) Simpson *v.* Hartopp, Willes, 512; Gisbourn *v.* Hurst, 1 Salk. 250; Muspratt *v.* Gregory, 3 Mee. & W. 677; Joule *v.* Jackson, 7 Mee. & W. 454; Gibson *v.* Ireson, 3 Q. B. 39; Finden *v.* M'Laren, 6 Q. B. 891; Miles *v.* Furber, Law Rep., 8 Q. B. 77.

(*i*) Read *v.* Burley, Cro. Eliz. 549.

(*k*) Williams *v.* Holmes, 8 Exch. 861; Lyons *v.* Elliott, 1 Q. B. D. 210.

benefit of trade; but, save as regards these excepted cases, all goods and chattels whatever found upon the premises, whether they in fact belong to the tenant or to a stranger, are distrainable by the landlord for rent (*l*), subject (as regards lodgers' goods) to the qualified protection given by the 34 & 35 Vict. c. 79. And here we will observe, that, by the Act lastly referred to, it has been provided, that a lodger, whose goods and chattels have been distrained for rent due by his landlord, may serve the distraining landlord (or his bailiff) with a written declaration stating that his (the lodger's) landlord has no right of property or beneficial interest in the goods and chattels in question, but that they are the property or in the lawful possession of the lodger, and also stating that nothing or only a specified amount is due by the lodger to his landlord for rent, and may with such declaration pay or tender the rent (if any) stated to be due to such landlord; and after such declaration and payment or tender, if the distraining landlord (or his bailiff) shall proceed with the distress, he shall be deemed guilty of an illegal distress, and the goods may be recovered by the lodger on the order of two justices or of a stipendiary magistrate (*m*). [However, with reference to the *beasts* of a stranger found on the tenant's land, the common law even made certain distinctions favourable to the owner of the beasts; for if they were put in by consent of the owner of the beasts, they were distrainable by the landlord immediately afterwards, for rent in arrear; as they also were, if they broke the fences to come on the land (*n*); but if the lands were not sufficiently fenced so as to keep out cattle, the beasts were exempted from distress, unless and until they had been *levant* and *couchant* (*levantes et cubantes*) on the land, that

(*l*) Francis *v.* Wyatt, 3 Burr. 1498; Crosier *v.* Tomkinson, 2 Kent, 439 Parsons *v.* Gingell, 4 C. B. 545.

(*m*) Phillips *v.* Henson, 3 C. P. D. 26; Sharp *v.* Fowle, 12 Q. B. D. 385; Heawood *v.* Bone, 13 Q. B. D. 179.

(*n*) Co. Litt. 47.

[is, had been long enough there to have lain down and risen up to feed, which in general was held to be one night at least, after which the law presumed that the owner had notice that his cattle had strayed, and it was his own negligence not to have taken them away (*o*). And yet, even where the beasts had been *levant* and *couchant*, if the obligation to repair the fences lay on the landlord or on his tenant, the beasts were not distrainable till actual notice had been given to the owner that they were there, and he neglected after such notice to remove them (*p*); for the law would not suffer the landlord to take advantage of his own or his tenant's wrong (*q*). 4. Things in the custody of the law, such as property already taken on a distress or in execution, are not distrainable (*r*); but as regards such execution, it is only good subject to providing for the rent in arrear (not exceeding one year's arrears) (*s*), or (when a bankruptcy is imminent) for half a year's arrears (*t*); and any growing crops seized and sold on an execution, so long as they remain on the lands, are, in default of other sufficient distress, liable to be distrained upon for rent becoming due after the seizure and sale (*u*); and where the execution is under the warrant of a county court, the landlord's claim for rent is also provided for (*x*). 5. Money is not distrainable, unless it has been placed in a *sealed bag* (*y*). 6. Nothing shall be distrained for rent, which may not be rendered again in as good plight as when it was distrained (*z*); for which reason, milk, fruit, and the like

(*o*) Gilb. Dist., by Hunt, 3rd ed. 47.

(*p*) Hemp *v.* Crewes, 2 Lutw. 1580.

(*q*) Poole *v.* Longueville, 2 Saund. 289.

(*r*) Co. Litt. 47 a; Smith *v.* Russell, 3 Taunt. 400; Wright *v.* Dewes, 1 Ad. & Ell. 641. See also 56 Geo. 3, c. 50, s. 6.

(*s*) 8 Anne, c. 18; 7 & 8 Vict. c. 96, s. 67.

(*t*) 53 & 54 Vict. c. 71, s. 28, amending 46 & 47 Vict. c. 52, s. 42.

(*u*) 14 & 15 Vict. c. 25, s. 2.

(*x*) 51 & 52 Vict. c. 43, s. 160.

(*y*) 1 Roll. Ab. 667; Vin. Abr. Dist. (H.); Wilson *v.* Ducket, 2 Mod. 61.

(*z*) Darby *v.* Harris, 1 Q. B. 895; Morley *v.* Pincombe, 2 Exch. 101.

[cannot be distrained; a distress being originally considered as only in the nature of a pledge or security, to be restored in the same plight when the debt is paid. So, antiently, sheaves or shocks of corn could not be distrained, because some damage must needs accrue in their removal; though a cart loaded with corn might, as that could be safely restored; and, now, by the statute 2 W. & M. c. 5, corn as soon as it is reaped, and also hay, may be distrained, as freely as other chattels (*a*). 7. Fixtures, or things fixed to the freehold, may not in general be distrained, as caldrons, windows, doors, and chimney-pieces, for they savour of the realty (*b*); also, trees and shrubs in a nursery (*c*). For this reason, also, growing corn could not be distrained, till the statute 11 Geo. II. c. 19 empowered landlords to distrain any corn or other products of the earth while still growing, and to cut and gather them when ripe (*d*).] 8. By the Railway Rolling Stock Protection Act, 1872, (35 & 36 Vict. c. 50,) wagons, trucks, carriages of all kinds, and locomotive engines used on railways, while at work in or on any colliery, quarry, mine, manufactory, warehouse, wharf, pier, or jetty in or on which there is any railway siding,—if bearing a proper metal plate or mark indicating the actual owner thereof,—are prohibited from being distrained for rent payable by the tenant of such colliery or other work. 9. By the Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), s. 4, all goods and chattels of a tenant or his family are exempt from distress, if and so far as they would be protected from seizure in execution under sect. 96 of the County Courts Act, 1846, (now sect. 147 of the County Courts Act, 1888,) that is to say, the wearing apparel and bedding of the tenant and

(*a*) Johnson *v.* Faulkner, 2 Q. B. 925; Hawkins *v.* Walrond, 1 C. P. D. 280.

(*b*) Niblett *v.* Smith, 4 T. R. 504; Dalton *v.* Whitten, 3 Q. B. 961; Darby *v.* Harris, 1 Q. B. 895; Hellawell *v.* Eastwood, 6 Exch. 295; Turner *v.* Cameron, Law Rep., 5 Q. B. 306.

(*c*) Clark *v.* Gaskarth, 8 Taunt. 431.

(*d*) Miller *v.* Green, 8 Bing. 92.

his family, and the tools and implements of the tenant's trade not exceeding 5*l.* in value. [Besides the preceding articles, which are *absolutely* privileged, there are others which are privileged *sub modo*,—that is to say, beasts of the plough (*averia carucæ*), and sheep, and instruments of husbandry; and also the instruments of a man's trade or profession; as the axe of a carpenter, the books of a scholar, and the like (*e*); for as to all of these the rule is, that they are exempt from distress, provided there be other sufficient distress on the premises, but not otherwise (*f*).] Also, by the express provisions of the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 45, live stock belonging to another person, and taken in by the tenant of a holding to which that Act applies to be fed at a fair price (that is to say, cattle that are agisted) (*g*), is not to be distrained for rent when there is other sufficient distress to be found; and when there is no other sufficient distress, such live stock may be distrained, *but only to the extent of the price for the agistment thereof that then remains due*, and may be redeemed by the true owner thereof upon payment of such price (*h*); and by virtue of the same Act, agricultural machinery belonging to another person, and *bonâ fide* hired to the tenant, is exempted from distress; as likewise is all live stock of another person which is on the land solely for breeding purposes.

Thirdly, let us next consider how distresses may be taken, disposed of, or avoided. And in the course of the inquiry, we shall find, that under this head very important innovations have been made, by modern statutes, upon the antient law. [For example, as regards the

(*e*) Nargett *v.* Nias, 1 E. & E. 439.

(*f*) Co. Litt. 47 a; 2 Inst. 132; Gorton *v.* Faulkner, 4 T. R. 565; Hutchins *v.* Chambers, 1 Burr. 589; Piggott *v.* Birtles, 1 Mee. & W. 441; Keen *v.* Priest, 4 H. & N. 236.

(*g*) Masters *v.* Green, 20 Q. B. D. 807.

(*h*) London and Yorkshire Bank *v.* Belton, 15 Q. B. D. 457, where the price of the agistment was "milk for meat."

[manner of disposing of distresses, although distresses were formerly looked upon in no other light, generally speaking, than as a mere pledge, or security for the payment of rent or other duties, or for the satisfaction of damage done; yet distresses for *rent* being found by the legislature to be the shortest and most effectual method of compelling the payment thereof, many beneficial enactments have, from time to time, been made for rendering the remedy more perfect, and in particular for allowing the things taken to be *sold;*] and the case is also now the same with regard to distresses of beasts which have been impounded: for these, under the provisions of "Martin's Act," (17 & 18 Vict. c. 60,) amending 5 & 6 Will. IV. c. 59, and 12 & 13 Vict. c. 92, may now after seven days be sold, and the proceeds appropriated to repay the impounder double the value of the food he has provided and the expenses,—the overplus, if any, being rendered to the owner.

[In pointing out the methods of distraining, we shall in general suppose the distress to be made for rent; and remark, where necessary, the difference between such a distress and one taken for any other cause.

In the first place, then, all distresses must be made *by day*, unless in the case of *damage feasant* (*i*); an exception being there allowed, lest the beasts should escape before they are taken (*k*). And when a landlord intends to make a distress he must, by himself or his bailiff (being a bailiff duly certificated by the county court) (*l*), make entry on the demised premises: and this formerly must have been during the continuance of the lease; but now, (by 8 Ann. c. 18,) if the tenant holds over, the landlord may distrain within six months after the determination of the lease; provided his own title or interest, as well as the tenant's possession, continue at the time of the distress (*m*).] If the lessor does not find sufficient distress on the premises, he

(*i*) 7 Rep. 7 a.
(*k*) Co. Litt. 142.
(*l*) 51 & 52 Vict. c. 21, s. 7.
(*m*) Taylerson *v.* Peters, 7 A. & E. 110.

could, as the law once stood, resort nowhere else; and therefore tenants, who were knavish, made a practice to convey away their goods and stock, fraudulently, from the house or lands demised, in order to cheat their landlords; and, as a general rule, the distress must still be on the premises demised (*n*); but by 8 Ann. c. 18, and 11 Geo. II. c. 19, the landlord may now distrain any goods of his tenant, carried off the premises *fraudulently or clandestinely*, wherever he finds them, within thirty days after the removal, unless they have been meanwhile *bonâ fide* sold for a valuable consideration: and all persons privy to, or assisting in, such fraudulent conveyance, forfeit double the value of the goods to the landlord (*o*). A landlord may also distrain, for rent service, the beasts of his tenant feeding upon any commons or wastes appendant or appurtenant to the demised premises (*p*). It is to be noticed, that the landlord, in order to distrain, may not break open his tenant's house, for that is a breach of the peace (*q*); but when he is once in the house, he may break open an inner door; and if goods have been fraudulently removed from the premises and locked up to prevent a distress, he may, with the assistance of a police officer, break open, in the day time, any place whither they have been so removed;—oath being first made to a justice, in case it be a dwelling-house, of a reasonable ground to suspect that such goods are concealed therein (*r*).

[Where a man is entitled to distrain for an entire duty, he ought to distrain for the whole at once; and not for part at one time and part at another (*s*); but if he distrain for the whole, and there be not sufficient on the

(*n*) Buszard *v.* Capel, 8 Barn. & Cress. 141.

(*o*) Angell *v.* Harrison, 17 L. J. (Q. B.) 25; Dibble *v.* Bowater, 2 Ell. Bl. 564.

(*p*) Miller *v.* Green, 8 Bing. 92.

(*q*) Co. Litt. 161; Eldridge *v.* Stacey, 15 C. B. (N. S.) 458; Nash *v.* Lucas, Law Rep., 2 Q. B. 590.

(*r*) 11 Geo. 2, c. 18; American Meat Co. *v.* Hendry, W. N. 1893, pp. 67, 82.

(*s*) 2 Lutw. 1532; Lee *v.* Cooke, 3 H. & N. 205.

[premises, or if he happen to mistake the value of the thing distrained, and so take an insufficient distress, he may take a second distress to complete his remedy (*t*).

Distresses must be proportioned to the rent in arrear; and by the statute of Marlbridge, (52 Hen. III. c. 4,) if any man take a great or unreasonable distress, he shall be heavily amerced for the same. Thus, if the landlord distrain two oxen for twelve pence rent, the taking of *both* is an unreasonable distress; but, if there were no other distress nearer the value to be found, he might reasonably have distrained *one* of them (*u*). And for homage or fealty, or suit and service, it is said that no distress can be excessive (*x*); for as these distresses cannot be sold, the owner, upon making satisfaction, may have his chattels again; and this distress for suit and service is the *distress infinite* which is referred to in the books (*y*). The remedy for excessive distress is by a special action grounded on the Statute of Marlbridge; for an ordinary action for the trespass is not maintainable upon this account, it being no injury at the common law (*z*).

When the distress is thus taken, the next consideration is the disposal of it. For which purpose the things distrained must in the first place be impounded by the taker. But, on their way to the pound, they may be *rescued* by the owner; for in case the things were taken without cause, or contrary to law, as if no rent was due, or they were taken upon the highway, or the like,—in these cases the owner may lawfully make rescue; but if they be once impounded, even though taken without any cause, the owner may not break the pound and take them out; for they are then

(*t*) Cro. Eliz. 13; stat. 17 Car. 2, c. 7; Hutchins *v.* Chambers, 1 Burr. 590.

(*u*) 2 Inst. 107.

(*x*) Bro. Abr. tit. Assize, 291, Prerogative, 98.

(*y*) 3 Bl. Com. p. 231; Scriven on Copyholds, 6th ed., by Brown, pp. 205—207.

(*z*) 1 Ventr. 104; Fitzgib. 85; Fisher *v.* Algar, 2 C. & P. 374; Hutchins *v.* Chambers, 1 Burr. 590; Roden *v.* Eyton, 4 C. B. 427; Tancred *v.* Leyland, 16 Q. B. 669; Glynn *v.* Thomas, 11 Exch. 870.

[in the custody of the law (*a*). And by 2 W. & M. c. 5, an action for treble damages will lie for illegally taking out of pound a distress for rent; and in case of distress *damage feasant*, it is enacted by 6 & 7 Vict. c. 30, that if any person shall release or attempt to release cattle lawfully seized by way of such distress, from the place where they shall be impounded, or on the way to or from such place, or shall destroy the pound, or any part, lock, or bolt thereof,—he shall, on conviction before two justices of the peace, be liable to a penalty not exceeding 5*l.*, and to payment of the reasonable charges and expenses; and in default, may be committed to the house of correction, with hard labour, for not more than three calendar months nor less than fourteen days; but, of course, the justices may not so convict, their jurisdiction being ousted, in any case of this nature, in which a question of title arises, or any question as to a bankruptcy or execution, or as to the obligation to repair walls, &c. (*b*).

A *pound* (*parcus*, which signifies any inclosure,) is either pound *overt*, that is, open overhead; or pound *covert*, that is, close. And by the statute 1 & 2 P. & M. c. 12, no distress of cattle can be driven out of the hundred where it is taken, unless to a pound overt within the same shire, and within three miles of the place where it was taken; which provision is for the benefit of the tenants, that they may know where to find and replevy the distress. But by the statute 11 Geo. II. c. 19, which was made for the benefit of landlords, a person distraining cattle for rent may turn any part of the premises, upon which the distress is taken, into a pound, *pro hâc vice*, for securing of such distress (*c*).] If animals be impounded, the onus of their support is thrown, by the legislature,

(*a*) Co. Litt. 47, 160, 161.

(*b*) 6 & 7 Vict. c. 30, s. 2.

(*c*) Washborn *v.* Black, 11 East, 504, n. (*a*); Pitt *v.* Shew, 4 B. & Ald. 208; Swann *v.* Earl Falmouth, 8 Barn. & Cress. 456; Woods *v.* Durrant, 16 Mee. & W. 149; Johnson *v.* Upham, 2 Ell. & Ell. 250; Tennant *v.* Field, 8 Ell. & Bl. 336.

upon the distrainor; for, by 12 & 13 Vict. c. 92, ss. 5, 6, he is bound to supply them with sufficient food and water, under a penalty of twenty shillings, for every refusal or neglect, to be adjudged by a justice in a summary way; but he is entitled, of course, to recover his outlay for food and water; and by 17 & 18 Vict. c. 60, he may recover even double the value of the food supplied as well as the other expenses (*d*). Moreover, a [distress of household goods, or other dead chattels, which are liable to be stolen, or damaged by weather, ought to be impounded in a pound covert; else the distrainor must answer for the consequences (*e*).

When impounded, the goods were formerly, as has been before observed, only in the nature of a pledge or security to compel payment, performance, or satisfaction; and upon this account it was held, that the distrainor was not (nor is he) at liberty to work or use a distrained beast (*f*); but he may milk cows taken in distress, for this is for the benefit of the owner (*g*). And thus the law still continues with regard to distresses for suit or service; for these must remain impounded till the owner makes satisfaction; or until he contests the right of distraining, by replevying the chattels, a proceeding of which we shall presently say more.

The distress therefore in these cases, though it puts the owner to inconvenience, and is consequently a punishment to him, yet if he continues obstinate, and will make no satisfaction or payment, is no remedy at all to the distrainor. But for a debt due to the crown, unless paid within forty days, the distress was always saleable even at the common law (*h*); and afterwards it was expressly pro-

(*d*) Dargan *v.* Davies, 2 Q. B. D. 118.

(*e*) Mason *v.* Newland, 9 C. & P. 575; Wilder *v.* Speer, 8 A. & E. 547; Bignell *v.* Clarke, 5 H. & N. 485.

(*f*) Smith *v.* Wright, 6 H. & N. 821.

(*g*) Bagshawe *v.* Goward, Cro. Jac. 148.

(*h*) Bro. Abr. tit. Distress, 71.

[vided by several Acts of Parliament (*i*), that in all cases of distress for rent, if the owner did not, within *five days* after the distress was taken, and notice of the cause thereof given him, replevy the same with sufficient security, the distress might be appraised by two appraisers, and sold towards satisfaction of the rent and charges (*k*); the overplus, if any, being rendered to the owner himself (*l*); and this is now substantially the law relating to the sale of goods taken in distress for rent,]—it being nevertheless remembered, that, by the Law of Distress Amendment Act, 1888 (*m*), s. 5, making general a similar provision contained in the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), ss. 50, 51, the goods need not in general now be appraised before sale, but are to be appraised only if the tenant, or other the owner of the goods, in writing requires such appraisement to be made; and that by the same Act (sect. 6), the period of *five* days may be extended to a period of not more than *fifteen* days, if the tenant, or other the owner of the goods, in writing requests such extension and gives the prescribed security. By such means, therefore, a full and entire satisfaction may now be had for rent in arrear, by the mere act of the party himself, viz., by distress, the remedy given at common law,—and by the sale consequent thereon, which is added by Act of Parliament. But it ought to be further mentioned, that, by the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 44, a landlord may not distrain (as regards tenancies to which that Act is applicable) for rent which became due more than a year before the distress; the Act providing, however, that where a quarter year, or half a year, beyond the legal day of payment, is ordinarily

(*i*) 2 W. & M. c. 5; 8 Ann. c. 18; 4 Geo. 2, c. 28; 11 Geo. 2, c. 19; 57 Geo. 3, c. 93.

(*k*) Wilson *v.* Nightingale, 8 Q. B. 1054; Lucas *v.* Tarleton, 3 H. & N. 116.

(*l*) Knight *v.* Egerton, 7 Exch. 407; Evans *v.* Wright, 2 H. & N. 527; Hart *v.* Leach, 1 Mee. & W. 560.

(*m*) 51 & 52 Vict. c. 21.

allowed for payment of the rent, the rent shall, for the purposes of this limitation on the right of distress, be deemed to become due on the expiration of such quarter year or half year (*n*.) And note, that equally as in the case of distresses for cattle *damage feasant*, a landlord distraining for rent cannot, while he holds the distress, sue for the rent (*o*).

[As for the proceeding called a replevin, to which we just had occasion to refer, it will be sufficient for the present to state, that to replevy, (*replegiare*, to take back the pledge,) is when a person who has been distrained upon for rent, or for cattle damage feasant, or for suit and service, applies to the proper authority (that is to say, to the registrar of the county court) to interpose (*p*): and thereupon has the distress returned into his own possession, upon giving good security to try the right of taking it, in a particular action (called the action of replevin), wherein the owner of the goods is the plaintiff and the distrainor the defendant; and engaging, in the event of being unsuccessful, to return the distress into the hands of the distrainor.

Before we quit this subject, it should be observed, that the many particulars which attend the taking of a distress, used formerly to make it a hazardous kind of proceeding: for if any one irregularity was committed, it vitiated the whole, and made the distrainor a trespasser *ab initio* (*q*). But now, by the statute 11 Geo. II. c. 19, s. 19, it is provided, that where any distress shall be made for any kind of *rent* justly due, and any subsequent unlawful act or irregularity shall be committed by the party distraining, the distress itself shall not therefore be deemed unlawful,

(*n*) Ex parte Bull, In re Bew, 18 Q. B. D. 642.

(*o*) Lehain *v.* Philpott, Law Rep., 10 Exch. 242.

(*p*) 51 & 52 Vict. c. 43, s. 134; 46 & 47 Vict. c. 61, s. 46.

(*q*) The Six Carpenters' case, 8 Co. Rep. 1466; Attack *v.* Bramwell, 3 B. & Smith, 520.

[or the parties making it trespassers *ab initio* (*r*); but the party grieved shall only have an action for the real damage sustained, and not even that, if tender of amends is made before any action is brought (*s*). And the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 145, contains like provisions applicable to a landlord recovering the possession of small tenements under the provisions contained in sections 138 to 144 of that Act.

VI. *The seizing of heriots due on the death of a tenant.*—This is another species of self-remedy, and is not much unlike that of taking cattle or goods in distress (*t*). As for that division of heriots which is called heriot-service, and is only a species of rent, the lord may distrain for this, as well as seize; but for heriot custom, (which Sir Edward Coke says lies only in *prender*, and not in *render*,) the lord may seize the identical thing itself, though he cannot distrain any other chattel for it (*u*). The like speedy and effectual remedy by seizure is given with regard to many things that are said to lie in franchise, as waifs, wrecks, estrays, and the like; all of which the persons entitled thereto may seize, without the aid of a court; not that they are debarred of their remedy by action; but they have also this other, and more speedy remedy, for the better asserting their property; the thing to be claimed being frequently of such a nature, that it might be out of the reach of the law before any action could be brought.

(*r*) Gambrell *v.* Earl of Falmouth, 5 Ad. & El. 403.

(*s*) Harvey *v.* Pocock, 11 Mee. & W. 740; Rodgers *v.* Parker, 18 C. P. 112.

(*t*) As to heriots, vide sup. vol. I. pp. 577, 578.

(*u*) Co. Cop. s. 25; Odiham *v.* Smith, Cro. El. 590; Major *v.* Brandwood, Cro. Car. 260.

[Having now mentioned the several species of remedies which may be had by the *mere* act of the party injured, we shall now mention those which arise from the joint act of both or of all the parties together; and of these there are only two, viz., (1.) *accord and satisfaction;* and (2.) *arbitration.*

I. *Accord* is an agreement to make satisfaction, entered into between the party injuring and the party injured; which, when performed, is a bar of all actions upon the same account. As if a man contract to build a house or deliver a horse, and fail in it; this is an injury, for which the sufferer may have his remedy by action: but if the party injured accepts a sum of money, or other thing, as a satisfaction, this is a redress of that injury, and entirely takes away the action (*x*);] and in an action by several plaintiffs for a joint demand, the defendant may plead an accord and satisfaction with *one* of them (*y*). But it is to be observed under this head, Firstly, that the action will not be taken away by mere accord without actual satisfaction; *e. g.*, in the case supposed, the mere agreement to accept the sum of money will not, until actual payment of the amount, bar the action on the original agreement to build the house or deliver the horse;—for this would only be substituting one right of action for another; and, Secondly, that the taking a smaller sum of money in lieu of a greater sum of fixed or certain amount, does not answer to the legal idea of satisfaction; *e. g.*, if a man owe 100*l.*, an agreement between him and his creditor that he shall pay 50*l.* in satisfaction, will not, though the latter sum be actually paid, suffice in law to bar the action on the original debt; but if anything except money be taken in lieu of a fixed sum of money, the action for the latter will be barred, however much its amount may exceed

(*x*) 9 Rep. 79.

(*y*) Wallace *v.* Kelsall, 7 Mee. & W. 264; Thurman *v.* Wild, 11 A. & E. 453; Jones *v.* Broadhurst, 9 C. B. 173.

the value of the thing so accepted (*z*). But what has been above stated with regard to joint demands, must, as regards joint obligees, be read subject to this qualification, namely, that if such obligees are entitled to the debt as tenants in common in equity (and not as joint tenants), an accord and satisfaction made to one of them will be no defence to a subsequent action by both or all of the joint obligees (*a*).

II. [*Arbitration* is where the parties injuring and injured submit all matters in dispute, concerning any personal chattels or personal wrong, to the judgment of two or more *arbitrators*, who are to decide the controversy (*b*); and it is usual to add, that another person be called in, if they fail to agree, as *umpire—imperator* or *impar* (*c*),—to whose sole judgment the dispute is then referred: and occasionally there is only one arbitrator originally appointed. The decision, in any of these cases, must be in writing, and is called an *award;* and thereby the question is as fully determined, and the right transferred or settled, as it could have been by the agreement of the parties or the judgment of a court of justice (*d*).] And even some criminal offences, *e. g.*, ordinary assaults (*e*),

(*z*) Pinnel's case, 5 Rep. 117 a; Cumber *v.* Wane, Stra. 426; Sibree *v.* Tripp, 15 Mee. & W. 23; Goddard *v.* O'Brien, 9 Q. B. D. 37; Beer *v.* Foakes, 11 Q. B. D. 221; Day *v.* M'Lea, 22 Q. B. D. 610; Bidder *v.* Bridges, 37 Ch. Div. 406.

(*a*) Steeds *v.* Steeds, 22 Q. B. D. 537.

(*b*) The legislature has prescribed this remedy in a variety of special cases; as, in questions as to *tithes and commons* (6 & 7 Will. 4, c. 71; 8 & 9 Vict. c. 118); as to compensation for lands taken for *undertakings of a public nature* (8 & 9 Vict. cc. 16, 18,—c. 18 being amended by 46 & 47 Vict. c. 15); for *railways* (c. 20); for *markets and fairs* (10 & 11 Vict. c. 14); for *water works* (c. 17); for *harbours, docks, and piers* (c. 27); for *improvements in towns* (c. 34); for *land drainage* (c. 38, and 24 & 25 Vict. c. 133); and for *cemeteries* (10 & 11 Vict. c. 65).

(*c*) Whart. Angl. Sacr. i. 772; Nichols. Scot. Hist. Libr. c. i. *prope finem.*

(*d*) Brownl. 55; 1 Freem. 410.

(*e*) Elworthy *v.* Reid, 2 Sim. & Stu. 372.

and nuisances (*f*), and the like, for which the party injured may (at his option) either prosecute or sue (*g*), may be thus disposed of. Originally the submission to arbitration might have been either by word or by deed; but in either case the submission was revocable; and it became the practice therefore to enter into mutual bonds, with condition to stand to the award, or, in default thereof, to pay a certain penalty. And experience having shown the great use of these peaceable and domestic tribunals, especially in settling matters of account and other mercantile transactions, which are difficult and almost impossible to be adjusted in court, the legislature established the use of them, as well in controversies where causes were depending, as in those where no action was brought,—enacting by the statute 9 Will. III. c. 15 (since repealed), that all who desired to end any such might agree in writing that their submission to arbitration or umpirage should be made a rule of court: whereupon the court was to make a rule that such submission, and award made therein, should be conclusive; and, after such rule, the parties disobeying the award were liable to be punished as for a contempt of court, unless, indeed, the award was set aside for corruption, or for undue means used in its procurement, or for other misbehaviour in the arbitrators or umpire, proved on oath to the court, within one Term after the award was made (*h*). And in consequence of this statute, it became an important part of the business of the courts to enforce the execution of such awards, when made; and they might be enforced either by action on the award, or by the like process of contempt as is awarded for any disobedience to an order of the court itself (*i*). Also, subsequently, by the 3 & 4 Will. IV. c. 42, it was provided

(*f*) Dobson *v.* Groves, 6 Q. B. 637.

(*g*) The Queen *v.* Hardey, 14 Q. B. 529; The Queen *v.* Blakemore, ib. 544.

(*h*) College of Christ *v.* Martin, 3 Q. B. D. 16.

(*i*) The Queen *v.* Hemsworth, 3 C. B. 745.

that the power of any arbitrator or umpire appointed in pursuance of a submission containing such agreement as aforesaid to make the arbitration a rule of court—or appointed by any rule of court, or judge's order, in any action—should not be revocable by either party without the leave of the court; but although, after that Act, such an agreement to refer to arbitration could not have been revoked by one of the parties thereto without the consent of the other, the appointment of a particular arbitrator might still have been revoked before award made (*j*).

The two last-mentioned Acts, with certain others in amendment thereof, have now been repealed by the Arbitration Act, 1889 (52 & 53 Vict. c. 49), by which it has been provided (among other things), that every submission in writing (sect. 27), unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the court, and shall have the same effect in all respects as if it had been made an order of the court (sect. 1); and the Arbitration Act, 1889, has also further enacted as follows:—That every submission to arbitration shall (excepting so far as it may expressly provide to the contrary) be deemed to include the following provisions, that is to say:—That if no other mode of reference is provided, the reference shall be to a single arbitrator; that if the reference is to two arbitrators, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award; that the arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them, may from time to time enlarge the time for making the award; that if the arbitrators have allowed their time or extended time

(*j*) Piercy *v.* Young, 14 Ch. Div. 210; Re Fraser and Ehrensperger, 12 Q. B. D. 310.

to expire without making an award, or have delivered to any party to the submission, or to the umpire, a notice in writing, stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators; that the umpire shall make his award within one month after the original or extended time appointed for making the award of the arbitrators has expired, or on or before any later day to which the umpire by any writing signed by him may from time to time enlarge the time for making his award; that the parties to the reference and all persons claiming through them respectively, shall (subject to any legal objection) submit to be examined by the arbitrators or umpire on oath or affirmation, in relation to the matters in dispute, and shall (subject as aforesaid) produce before the arbitrators or umpire all books, deeds, papers, accounts, writings, and documents within their possession or power respectively which may be required or called for, and do all other things which during the proceedings on the reference the arbitrators or umpire may require; that the witnesses on the reference shall, if the arbitrators or umpire think fit, be examined on oath or affirmation; that the award to be made by the arbitrators or umpire shall be final and binding on the parties, and the persons claiming under them respectively; and that the costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner these costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client (*k*). And the Act further provides, that the arbitrators or umpire shall, unless the submission expresses a contrary intention, have power to administer oaths to, or take the affirmations of, the parties and witnesses appearing; and to state an award as to the whole or part of the matters comprised in

(*k*) 52 & 53 Vict. c. 49, s. 2, and Sch. I.

the submission, in the form of a special case for the opinion of the court; and to correct any clerical mistake or error in the award, arising from any accidental slip or omission (sect. 7). Also, any party to the submission may sue out a writ of subpœna *ad testificandum*, or a writ of subpœna *duces tecum;* but no person is compellable, under any such writ, to produce any document which he could not be compelled to produce on the trial of an action (sect. 8).

As to the effect of an award, it is in general, and as a consequence of the provision in that behalf contained in the submission, conclusive and final; and upon an action or other proceeding brought to enforce it, no defence can be raised unless in respect of some defect apparent *on the face of the award itself*,—the rule being that any *extrinsic* objection must be taken in the shape of a substantive application to the court to set aside the award (*l*). And with reference to the setting aside of awards, it is proper to observe as follows: That an award might always have been set aside on any ground which rendered it an illegal award (*m*); and before the award was made, the arbitrator (or umpire) might, if shown to be personally improper to act in the matter, have been restrained by injunction from acting under the reference (*n*); and, in a proper case, the court would have directed the arbitrator (or umpire) as to the law applicable to the case, where he was proceeding contrary to such law (*o*). And it is now provided, by the Arbitration Act, 1889 (by sect. 10), that in all cases of reference to arbitration, the court or a judge may from

(*l*) Braddick *v.* Thompson, 8 East, 344; Paull *v.* Paull, 2 Dowl. 340; Grazebrook *v.* Davis, 5 B. & C. 534; Macarthur *v.* Campbell, 2 Ad. & Ell. 52.

(*m*) Mercier *v.* Pepperell, 19 Ch. D. 58.

(*n*) Beddow *v.* Beddow, 9 Ch. D. 99; Pescod *v.* Pescod, W. N. 1888, p. 2.

(*o*) Hart *v.* Duke, 32 L. J. (Q. B.) 55; East and West India Docks Co. *v.* Kirk and Randall, 12 App. Ca. 738; and disting. James *v.* James, 22 Q. B. D. 669.

time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire; and (by sect. 11) that where an arbitrator or umpire misconducts himself, the court may remove him; and where either the arbitrator or umpire has misconducted himself, or the arbitration or award has been improperly procured, the court may set aside the award; and it has been further provided, by the same Act (by sect. 19), that any referee, arbitrator, or umpire may, at any stage of the proceedings under a reference, and shall if so directed by the court or a judge, state in the form of a special case, for the opinion of the court, any question of law arising in the course of the reference. And it having been a provision of the repealed statute 9 Will. III. c. 15, that an application to set aside an award must have been made before the last day of the *Term* next after the award was made and published (*p*), —a provision which was maintained in the Common Law Procedure Act, 1854, s. 9,—under the present practice, the application is to be made at any time before the last day of the *Sittings* next after the award has been made and published (*q*), the application being no longer by motion *ex parte*, but by motion on notice specifying the grounds of the application (*r*).

The time for making an award is that agreed upon in the submission; and when no time is specified, it is three months (*s*); but in either case the court will extend the time (*t*), but in no case beyond the ultimate period (if any) prescribed by statute (*u*). When the court has remitted an award to the arbitrator or umpire, then (unless the order otherwise directs) he is to make his

(*p*) Young *v.* Timmins, 1 Tyrw. 230, n.; 36 & 37 Vict. c. 66, s. 26; and Smith *v.* Parkside Mining Co., 6 Q. B. D. 67.

(*q*) Order LXIV. rule 14.

(*r*) Order LII. rules 3, 4.

(*s*) 52 & 53 Vict. c. 49, s. 2, and Sch. I.

(*t*) Lord *v.* Lee, L. R., 3 Q. B. 404; Re May and Harcourt, 13 Q. B. D. 688; 52 & 53 Vict. c. 49, s. 9.

(*u*) In re Mackenzie, 17 Q. B. D. 114.

award within three months after the date of the order (*x*). The award, once it has been duly made, and the time for setting it aside has expired, or (*semble*) even before that time, may be enforced in like manner as a judgment or order of the court to the like effect may be enforced (*y*),—that is to say, either by process for contempt in the manner heretofore usual, or by such other means as shall, under the circumstances, be appropriate and conveniently applicable.

(*x*) 52 & 53 Vict. c. 49, s. 10. (*y*) Ibid. s. 12.

CHAPTER II.

OF REDRESS BY THE MERE OPERATION OF LAW.

[THE remedies for private wrongs, which are effected by the mere operation of the law, fall within a very narrow compass, there being, it is believed, only two instances of this sort capable of being suggested; the one, that of *retainer*, where a creditor is made executor or administrator to his debtor; the other, that of *remitter*.

I. As to *Retainer*.—The law relating to executors and administrators has been already discussed in a former part of the work (*a*); where, amongst other matters, it was mentioned, that if a person, indebted to another, make his creditor executor of his will, or if a creditor obtain letters of administration to his debtor, in these cases the law gives the creditor a remedy for his debt, by allowing him to *retain* so much as will pay himself, before any others whose debts are of equal degree (*b*). This is a remedy by the mere act of law, and grounded upon this reason,—that the executor cannot, without an apparent absurdity, commence an action against himself as representative of the deceased, to recover that which is due to him in his own private capacity; but, having the whole personal estate in his hands, so much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose. Else, by being made executor, he would be

(*a*) Vide sup. vol. II. p. 197. (*b*) 1 Roll. Abr. 922; Plowd. 543.

[put in a worse condition than all the rest of the world besides; as every other creditor but himself is in a condition to commence an action, and obtain judgment, for recovery of his debt. But, as the law stands, the effect of this right of retainer is to put him in some measure in a better position than other creditors; because it enables him to obtain payment *first*, (among all creditors of equal degree,) and before any other has had time to commence an action; and this seems to illustrate a remark of Lord Bacon, that the benignity of the law is such, as when, to preserve the principles and grounds of law, it depriveth a man of his remedy without his own fault, it will rather put him in a better degree and condition than in a worse (*c*). However, the executor shall not retain his own debt in prejudice to those of a higher degree; for the law only puts him in the same situation as if he had sued himself as executor, and recovered his debt; which he never could be supposed to have done, while debts of a higher nature subsisted. Neither shall one executor be allowed to retain his own debt, to the prejudice of that of his co-executor in equal degree; but both shall be discharged in proportion (*d*). Nor shall an executor of his own wrong be in any case permitted to retain (*e*).] Moreover, the right of retainer exists in respect of *legal* assets only (*f*); and these must have come to the hands of the executor (*g*); but the remedy by retainer, when it is available, extends also to claims for damages arising on the breach of pecuniary contracts,—*scilicet*, when such damages are ascertainable by a recognized standard or measure (*h*).

II. As to *Remitter*.—This is where he who hath the right of entry in lands, but is out of possession, obtains after-

(*c*) Bac. Elem. c. 9.

(*d*) Vin. Abr. tit. Executors, D. 2.

(*e*) 5 Rep. 30.

(*f*) Richmond *v.* White, 12 Ch. D. 361; Campbell *v.* Campbell, 16 Ch. D. 198; Crowder *v.* Stewart, 16 Ch. D. 368; Walters *v.* Walters, 18 Ch. D. 182.

(*g*) Norton *v.* Compton, 30 Ch. Div. 15.

(*h*) Loane *v.* Casey, 2 W. Bl. 965.

wards the possession of the lands by some subsequent, and of course defective, title; in which case he is remitted or sent back, by operation of law, to his antient and more certain or perfect title (*i*). For the possession which he hath gained by a bad title, shall be *ipso facto* annexed to his own inherent good one; and his defeasible estate shall be utterly defeated and annulled by the instantaneous act of law, without his participation or consent (*k*). Thus, if A. disseise B., that is, wrongfully turn B. out of possession of the freehold, and afterwards demise the land to B. (without deed) as tenant from year to year, under which demise B. entereth; this entry is a remitter to B., who is in of his former and surer estate (*l*). But if A. had demised to him for years, by deed or by matter of record, there B. would not have been remitted; for if a man by deed takes a lease of his own lands, it shall bind him to the rent and covenants; because a man can never be allowed to affirm that his own deed is ineffectual, since that is the greatest security on which men rely in all manner of contracting. And the law would have been the same, if the lease had been by matter of record; for that is of its own nature uncontrollable evidence, which a man cannot be allowed to controvert (*m*). And the reason given by Littleton, why this remedy by remitter was allowed, is because otherwise he who hath right would be deprived of all remedy (*n*); for as he himself is in possession of the land, and cannot therefore enter upon himself, there is no person upon whom he can make entry (*o*).

And thus much for these extrajudicial remedies, which are furnished or permitted by the law, where the parties injured are so peculiarly circumstanced as not to make it possible to apply for redress in the usual and ordinary methods.

(*i*) Litt. ss. 659, 693, 695; Co. Litt. 363 b; Gilb. Ten. 129; 1 Sand. Uses, 166; Doe *v.* Woodroffe, 10 Mee. & W. 608.

(*k*) Co. Litt. 358; Wood *v.* Sir J. Shurley, Cro. Jac. 409.

(*l*) Litt. s. 695; Gilb. Ten. 129.

(*m*) Gilb. Ten. ubi sup.

(*n*) Litt. s. 661; Litt. by Butl. 347 b. n. (1).

(*o*) Litt. s. 693; Gilb. Ten. ubi sup.; Co. Litt. by Butl. ubi sup.

CHAPTER III.

OF THE COURTS IN GENERAL.

[THE next object of our inquiries is the redress of injuries by the courts of justice, wherein the act of the parties and the act of law co-operate,—the act of the parties being necessary to set the law in motion, and the process of the law being the instrument whereby the redress is effectuated.

And here it will not be improper to observe, that although in the several cases of redress by the act of the parties mentioned in a former chapter, the law allows an extrajudicial remedy, yet that does not exclude the ordinary courts of justice; but it is only an additional weapon put into the hands of certain persons in particular instances, where the peculiar circumstances of their situation require a more expeditious remedy, than the formal process of any court of judicature can furnish. Therefore, though I may defend myself, or my relations, from external violence, I yet am entitled alternatively to an action of assault and battery: and though I may retake my goods if I have a fair and peaceable opportunity, this power of recaption does not debar me from my action for their seizure and detention: Again, I may either enter on the land on which I have a right of entry, or may demand and recover possession of it by an action: and I may either abate a nuisance by my own authority, or call upon the law to do it for me: I may distrain for rent, or have an action for the debt, at my own option: and if I do not distrain

[my neighbour's cattle *damage feasant*, I may compel him by action of trespass to make me a fair satisfaction: So, also, if a heriot be withheld from me by fraud or force, I may recover it though I never seized it. Also, with regard to accords and arbitrations, these, in their nature being merely an agreement or compromise, indisputably suppose a previous right of obtaining redress some other way, which is given up by such agreement. But as to remedies by the mere operation of law, those are given, because no remedy can be administered by action, without running into the absurdity of supposing a man to bring an action against himself.

In treating of the remedies afforded by the courts, we shall begin with some remarks on the nature of the courts themselves, and on their incidents in general; and then proceed to consider the several species of them, which have been erected and acknowledged by the laws of England.

Firstly, as to courts generally.—A court is defined to be a place wherein justice is judicially administered (*a*). And, as by our excellent constitution the sole executive power of the laws is vested in the person of the sovereign, it will follow that all courts of justice (which are the medium by which he administers the laws) are derived from the power of the crown; for, whether created by Act of Parliament or letters-patent, or subsisting by prescription,—the only three methods by which any court of judicature can exist,—the king's consent in the two former is expressly, and in the latter is impliedly, given (*b*); and in all these courts the sovereign is supposed, in contemplation of law, to be always present, being represented by his judges, whose power is only an emanation from his royal prerogative. And for the more speedy, universal, and impartial administration of justice between subject and subject, the law hath appointed a variety of courts, some with a more limited, others with a more extensive, jurisdiction; some constituted to inquire only, others to hear and

(*a*) Co. Litt. 58. (*b*) Co. Litt. 260.

[determine; some to determine in the first instance, others upon appeal and by way of review.]

Some of these courts are *inferior* and others *superior;* some have a jurisdiction at *common law* and some *in equity*, and some in both; others have an *ecclesiastical* or *maritime* jurisdiction only; and in others again, these various jurisdictions are combined. And we shall consider all these varieties of courts in their respective places; but we may here mention one distinction that runs through them all, viz., that some of them are courts *of record*, and others *not of record*. Now [a court of record is one whereof the acts and judicial proceedings are enrolled for a perpetual memorial and testimony: which rolls are called the records of the court, and of such high and supereminent authority, that their truth is not to be called in question. For it is a settled rule and maxim, that nothing shall be averred against a record, nor shall any plea, or even proof, be admitted to the contrary (*c*); and if the existence of a record be denied, it shall be tried by nothing but itself; that is, upon bare inspection whether there be any such record or no; else there would be no end of disputes. But this rule does not prevent the court from enquiring, *e.g.*, whether the record (in the case of a judgment debt) was based on no consideration, a matter which is often very material in bankruptcy (*d*); also, if there appear any mistake of the clerk in making up the record, the court will direct him to amend it; and in general, all slips (being slips merely) in legal proceedings (including records) may be amended by an order of the court, to be obtained in a summary way (*e*).

All courts of record are the courts of the sovereign, in right of his crown and royal dignity (*f*);] and therefore

(*c*) Co. Litt. 260; sup. vol. 1. p. 453.

(*d*) In re Tollemache, 14 Q. B. D. 415, 606; In re Lennox, 16 Q. B. D. 316; Scotch Whisky Distillers, 22 Q. B. D. 83.

(*e*) Order XXVIII. (1883), r. 11; Mellor *v.* Swire, 30 Ch. Div. 239; Staniar *v.* Evans, 34 Ch. D. 470.

(*f*) Finch. L. 231.

every court of record has authority to fine and imprison for contempt of its authority committed *in facie* (*g*): and the merely conferring the power of fine or imprisonment for contempt on a new jurisdiction, makes it a court of record (*h*). But in some courts of record, *e.g.*, in county courts, this power is limited to contempts committed *in facie curiæ*, that is to say, to wilful insults to the judge, or to any juror or witness, registrar or other officer of the court, during his attendance in court, or in going to or returning from the court, and to wilful interruptions of the business of the court, and to wilful misbehaviour in court (*i*). Courts *not* of record, on the other hand, are courts of inferior dignity, and in a less proper sense the king's courts—and these are not, as the general rule, intrusted by the law with any power to fine or imprison for contempt (*k*); and in these, the proceedings not being enrolled or recorded, as well their existence, as the truth of the matters therein contained, shall, if disputed, be tried and determined by a jury (*l*).

[To every court there must be at least three constituent parts, the *actor*, *reus*, and *judex;* the *actor*, or plaintiff, who complains of an injury done: the *reus*, or defendant, who is called upon to make satisfaction for it: and the *judex*, or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and, if any injury appears to have been done, to ascertain, and by its officers to apply, the remedy. And it is usual,

(*g*) 8 Rep. 38 b; Hawk. b. 2, c. 22, s. 1; Bac. Ab. Courts, E.; R. *v.* Clement, 4 B. & Ald. 233; R. *v.* Davidson, 5 B. & Ald. 337; R. *v.* James, ib. 894; Miller *v.* Knox, 4 Bing. N. C. 574; Doe *d.* Cardigan *v.* Bywater, 7 C. B. 794.

(*h*) Groenvelt *v.* Burwell, Salk. 200; Ex parte Fernandez, 10 C. B. (N. S.) 1; Reg. *v.* Castro, Law Rep., 9 Q. B. 219.

(*i*) 51 & 52 Vict. c. 43, ss. 162, 163, re-enacting like provisions in 9 & 10 Vict. c. 95, s. 113; and 12 & 13 Vict. c. 101, s. 2; Levy *v.* Moylan, 10 C. B. 189; The Queen *v.* Lefroy, Law Rep., 8 Q. B. 134.

(*k*) Dyson *v.* Wood, 3 Barn. & Cress. 449.

(*l*) 2 Inst. 311; 8 Rep. 38 b; 11 Rep. 43 b; 3 Bl. Com. 24.

[in the higher courts, to have solicitors and counsel as assistants.]

Of solicitors and counsel we have already spoken elsewhere in this work (*m*); and we shall now only observe with reference to their connection with courts of justice, that a solicitor answers to the *procurator*, or proctor, of the civilians and canonists, being one who is put in the place, stead, or *turn* of another, to manage his proceedings in a cause; and for this reason he used to be called an *attorney-at-law*, though the name of solicitor is now generally adopted. [Formerly, every suitor was obliged to appear in person, to prosecute or defend his suit, unless by special licence under the king's letters patent; but, as in the Roman law (*n*), so with us, upon the principle of convenience,] it is now permitted in general, that solicitors may prosecute or defend in the absence of the parties to the action (*o*); but as regards an infant, he or she sues by a next friend and defends by a guardian; and it is the next friend or the guardian that appoints the solicitor (*p*); and this rule used also to apply substantially to married women, who sued by their next friends and defended with their husbands; but so far as married women are concerned, the rule is now almost (or quite) obsolete. Solicitors are now formed into a regular body; [they are duly admitted to the execution of their office (*q*); and are

(*m*) As to solicitors, vide sup. pp. 228 et seq.; as to counsel, sup. vol. I. p. 17.

(*n*) Inst. Lib. 4, tit. 10.

(*o*) According to Blackstone, this was first permitted by stat. Westm. 2, c. 10 (see 3 Bl. Com. 26). It was provided, however, by a previous statute (20 Hen. 3, c. 10), that every freeman might make suit by attorney in the court of the county, tithing, hundred, and wapentake, or the court of his lord; and even in the time of Henry the Second, a party who had appeared in person, might afterwards appoint an attorney (*responsalis*) to represent him thenceforth in the cause. (Glan. lib. xi. c. 1.)

(*p*) Bro. Abr. tit. Ideot, 4; Co. Litt. 135 b; 2 Saund. 212, n. (4); Beverley's case, 4 Rep. 124 b; Oulds *v.* Sansom, 5 Taunt. 261; F. N. B. 25.

(*q*) So early as the statute 15 Edw. 2 (Stat. de fin. et attorn.), regulations were made as to their admission; and by 4 Hen. 4, c. 18,

[officers of the courts in which they practise; and as they have many privileges on account of their attendance there, so they are peculiarly subject to the animadversion of the judges.]

Of counsel, otherwise called (among the civilians) *advocates*, there are (as mentioned in a former place) two species or degrees, namely, barristers and serjeants. We have seen, that the former are admitted after a considerable period of study, in the Inns of Court; and in our old books, they are styled apprentices, *apprenticii ad legem*, being there looked upon as merely learners, and not qualified to execute the full office of an advocate till they were of sixteen years' standing; at which time, according to Fortescue, they might be called to the state and degree of serjeants, or *servientes ad legem* (*r*). How antient and honourable this state and degree of serjeant is, hath been so fully displayed by many learned writers, that it need not be here enlarged on (*s*); it is sufficient to observe, that serjeants at law are bound, by a solemn oath, to do their duty to their clients (*t*). It used also to be the custom for the judges to be admitted into this venerable order before they were advanced to the bench (*u*); for otherwise they were apparently not qualified (at least, the barons of the exchequer were not qualified) to become justices of assize (*v*); but the necessity for this has now ceased, and with it the custom,—it having been enacted by 36 & 37 Vict. c. 66, s. 8, that no person appointed a judge, either of the High Court of Justice or of the Court

it was enacted, that they should be examined by the judges, and none admitted but such as were virtuous, learned, and sworn to do their duty.

(*r*) De LL. c. 50.

(*s*) See Fortesc. c. 50; 10 Rep. pref.; Dugdal. Orig. Jurid.; Case of the Serjeants, 6 Bing. N. C. 235; a tract by Serjeant Wynne, printed in 1765, entitled "Observations "touching the Antiquity and Dig- "nity of the Degree of Serjeant at "Law;" and the treatise called "*Serviens ad Legem*," by Mr. Serjeant Manning.

(*t*) 2 Inst. 214.

(*u*) Fortesc. c. 50.

(*v*) 14 Edw. 3, st. 1, c. 16; 3 Bl. Com. p. 27.

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of Appeal, shall be required to take or to have taken the degree of serjeant at law; and no serjeants have in fact been created since the year 1875.

From among the general body of counsel some are from time to time selected, who (on the nomination of the lord chancellor) are made by letters patent her Majesty's counsel; the two principal of whom are called the attorney-general and the solicitor-general. [The first king's counsel, under the degree of serjeant, was Sir Francis Bacon, but he was so made *honoris causâ*, and without either patent or fee (*x*); so that the first of the modern order (who are now the sworn servants of the crown) seems to have been Sir Francis North, afterwards lord keeper of the great seal to King Charles the second (*y*). These counsel of the crown answer in some measure to the advocates of the revenue, *advocati fisci*, among the Romans; for they must not be employed in any cause against their sovereign, without special licence (*z*); in which restriction, they agree with the advocates of the fisc (*a*). But in the imperial law the prohibition was carried still farther; for, excepting in some peculiar causes, the fiscal advocates were not permitted to be concerned at all in private suits between subject and subject (*b*).

In addition to the creation of counsel to the crown, a custom has in modern times prevailed of granting letters patent of precedence among themselves, to such barristers as it is thought proper to honour with that mark of distinction; whereby they are entitled to such rank and preaudience as are assigned in their respective patents (*c*);

(*x*) See his Letters, 256.

(*y*) See his Life, by Roger North, 37.

(*z*) Hence a queen's counsel cannot plead in court for the defendant in a criminal prosecution, without a licence from the crown; which licence is never refused; but is procured at an expense of about 2*l.* 2*s.* (formerly 9*l.*).

(*a*) Cod. 2, 2, 1.

(*b*) Cod. 2, 7, 13.

(*c*) The *queen's advocate* is usually placed immediately after the attorney-general. (See Manning's "*Serviens ad Legem*," pp. 19, 20.) It may also be noticed, that when there is a *queen consort*, her attorney

[which is sometimes next after the attorney-general, but usually next after the counsel to the crown then being.] Barristers with patents of precedence rank promiscuously with the king's counsel, and sit together with them and the serjeants *within* the bar of the respective courts, instead of sitting *without* it, as is the case with counsel in general (*d*); but they are not the sworn servants of the king, and, consequently, without any licence had for that purpose, may accept a retainer in any cause against the crown. And they, and all other counsel, may indiscriminately take upon them the protection and defence of any suitors, whether plaintiff or defendant (*e*); who are therefore called their *clients*, like the dependents upon the antient Roman orators.

[The Roman orators, it is to be remembered, practised *gratis;* for honour merely, or at most for the sake of gaining influence; and so likewise it is established with us, that a counsel can maintain no action for his fees (*f*); which are

and solicitor-general rank with those of the king's counsel who have patents of precedence. (Seld. Tit. of Hon. 1, 6, 7.)

(*d*) It may be observed, that in the Exchequer Division of the High Court of Justice, there were appointed by the court two barristers, called the *post*-man and the *tub*-man (from the places in which they sat), who had a precedence in motions. (See R. *v.* Bishop of Exeter, 7 Mee. & W. 188.)

(*e*) At one time, an exception to this existed as regarded the Court of Common Pleas, the serjeants having the exclusive privilege of being heard in that court, at its sittings in *banc*. And though, in 1834, a warrant issued under the sign manual, directing that this privilege should cease, yet the Court of Common Pleas refused to act upon its authority, and decided that, as the privilege was founded on immemorial usage, it could not be taken away by the *warrant* of the crown. (Case of the Serjeants, 6 Bing. N. C. 235.) However, it was enacted, by 6 & 7 Vict. c. 18, s. 61, that, in appeals to the Common Pleas from the revision courts, all barristers should be entitled to audience; and afterwards, by 9 & 10 Vict. c. 54, (see 3 C. B. 537,) it was provided generally, that all barristers, according to their respective rank and seniority, should have equal right and privilege of practising, pleading, and audience, in the Common Pleas, together with the serjeants.

(*f*) Davis, pref. 22; 1 Ch. Rep. 38; and as regards the effect of a *special contract* to pay a fixed sum of money, instead of the usual fees, see Kennedy *v.* Broun, 13 C. B. (N. S.) 677; Mostyn *v.* Mostyn,

[given, not as *locatio vel conductio*, but as *quiddam honorarium;* not as a salary or hire, but as a mere gratuity, which a counsellor cannot demand without doing wrong to his reputation (*g*); and so it was also laid down with regard to advocates in the civil law (*h*), whose *honorarium* was directed by a decree of the senate not to exceed in any any case ten thousand sesterces, or about 80*l.* of English money (*i*).

It is also deserving of notice, that a counsel may, on his client's behalf, compromise the case, without any express instructions so to do, and even contrary to his instructions (*k*); also, that in order to encourage due freedom of speech in the lawful defence of their clients, and at the same time to give a check to the unseemly licentiousness of prostitute and illiberal men, (a few of whom may sometimes insinuate themselves even into the most honourable professions,) it hath been holden, that a counsel is not answerable for any matter by him spoken in court relative to the cause in hand, and suggested in his client's instructions; although it should reflect upon the reputation of another, and even prove absolutely groundless (*l*). But he is not therefore privileged to repeat the same matters out of court (*m*); and even in court, if he mention an untruth of his own invention, or even upon instructions, if it be impertinent to the cause in hand, he is then liable to an action at the suit of the party injured (*n*). And counsel guilty of deceit or collusion were, moreover, made punishable, by

Law Rep., 5 Ch. App. 457; and The Queen *v.* Doutre, 9 App. Ca. 745.

(*g*) Davis, 23.

(*h*) Ff. 11, 6, 1.

(*i*) Tac. Ann. 1, 11, 7.

(*k*) In re Hoblen, 8 Beav. 101; Mole *v.* Smith, 1 Jac. & Walk. 673; Swinfen *v.* Swinfen, 18 C. B. 485; 1 C. B. (N. S.) 364; 24 Beav. 559; Chambers *v.* Mason, 5 C. B. (N. S.) 59; Swinfen *v.* Lord Chelmsford, 5 H. & N. 890; Strauss *v.* Francis, Law Rep., 1 Q. B. 379.

(*l*) Hodgson *v.* Scarlett, 1 B. & Ald. 232; Munster *v.* Lamb, 11 Q. B. D. 588.

(*m*) Flint *v.* Pike, 4 B. & C. 473.

(*n*) Brook *v.* Sir H. Montague, Cro. Jac. 90.

[the statute of Westminster the first (3 Edw. I.), c. 28, with imprisonment for a year and a day, and perpetual silence in the courts,—a punishment that even in more modern times has been inflicted for gross misdemeanors in practice (*o*).] And we may close our consideration of courts in general with this remark, that (as a general rule, hardly subject to exception,) solicitors and counsel possess the exclusive privilege of transacting business in the courts; and the usage is for the solicitor to see the client and to instruct the counsel (*p*); nor, as the general rule, is any one (other than the party himself), unless he be either a solicitor or a counsel, allowed to address the court, or to examine or cross-examine the witnesses. Also, the work in chambers falls in general to solicitors, and the work in open court to barristers, who used to have an absolutely exclusive privilege in this latter respect (*q*): but in quite recent times, counsel have been entitled to attend in chambers; and as we have elsewhere noticed, solicitors may now, in certain of the courts, appear as advocates.

(*o*) Ray, 376.

(*p*) Doe *d.* Bennett *v.* Hale, 15 Q. B. 171.

(*q*) Collier *v.* Hicks, 2 B. & Ad. 668; Plac. Ab. 137; Canc. Rot. 22, temp. 32 Hen. 3; Matt. Par. Hist. p. 1077.

CHAPTER IV.

OF THE INFERIOR COURTS.

We are next to consider the several species of courts. [And, in the first place, we may observe, that the policy of our antient constitution, as regulated by King Alfred, was to bring justice to every man's door, by constituting as many courts of judicature as there were manors in the kingdom, in which local courts injuries should be redressed, in an easy and expeditious manner, by the suffrages of neighbours and friends; and these local courts communicated with others of a larger jurisdiction, and these latter with others of a still greater power, ascending gradually from the lowest through the intermediate up to the highest or supreme courts,—the supreme courts being constituted to correct the errors of the inferior ones, and to determine such cases as, by reason of their weight and difficulty, demanded a more solemn discussion, and the course of justice flowing in large streams from the king, as the fountain, to his superior courts of record, and being then sub-divided into smaller channels, till the whole and every part of the kingdom was plentifully watered and refreshed.] We shall treat in this chapter of the inferior courts, reserving for the next chapter the Supreme Court and the House of Lords. And first, we may make this general observation with regard to all inferior courts, viz., that it forms one of the provisions of the Judicature Acts, that it shall be lawful for her Majesty from time to time, by order in council, to confer on any inferior court of *civil*

jurisdiction the same jurisdiction in equity as has been conferred (as we shall see hereafter) on the modern county courts, and the same jurisdiction in admiralty as has been conferred on certain of such county courts; and, further, that every inferior court which now or hereafter shall have jurisdiction in equity, or at law and in equity, and in admiralty respectively, shall, as regards all causes of action within its jurisdiction, have power to grant, and shall grant, in any proceeding therein, such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to any ground of defence or counter-claim, equitable or legal, in as full and ample a manner as might be done in the like case by the High Court of Justice itself,—subject to this, that if the defence or counter-claim involve matter beyond the jurisdiction of the court, its duty is to dispose of the whole controversy so far as relates to the demand and the defence; and then as regards the counter-claim, it was not to give relief to the defendant thereon, so far as such relief was beyond the jurisdiction of the inferior court; but, on the application of either party, the whole matter was to be transferred from the inferior court into the high court (*a*); however, now, this limit to the relief on counter-claim has, as regards county courts, been practically removed, unless either party objects in writing to the jurisdiction of the court (*b*).

Proceeding now to the inferior courts, and commencing with,—

I. [*The Court Baron.*—This is a court incident to every manor in the kingdom, to be holden by the steward within the said manor (*c*); and it is of two natures (*d*),—the one a customary court, in which the steward of the manor is

(*a*) 36 & 37 Vict. c. 66, ss. 88—90; Davis *v.* Flagstaff Company, 3 C. P. D. 228; Ex parte Martin, 4 Q. B. D. 212; Martin *v.* Bannister, ib. 491.

(*b*) 47 & 48 Vict. c. 61, s. 18.

(*c*) 4 Inst. 268.

(*d*) Co. Litt. 58.

[the judge, and the *copyholders* are the suitors, and their estates are transferred by surrender and admittance, and other matters are therein transacted relative to their tenures;] and the other a court of common law, held before the *freehold* tenants who owe suit and service to the lord of the manor, and who are *pares* of each other, and are bound by their feodal tenure to assist their lord in the dispensation of domestic justice, and of which court the steward of the manor is merely the registrar and not the judge; but the two species of courts baron, though in their nature distinct, are frequently confounded together (*e*). The freeholders' court (with which alone, as being a court of *justice*, we are now concerned) was antiently held every three weeks; and its most important business was to determine, in the antient species of *real* action called the "writ of right," all controversies relating to *lands* within the manor (*f*); which jurisdiction was however greatly curtailed by 3 & 4 Will. IV. c. 27, s. 36, and was afterwards, by 23 & 24 Vict. c. 126, s. 26, in effect, abolished. The court baron had also jurisdiction in any *personal* action, wherein the debt or damages claimed did not amount to 40*s.* (*g*); the action was, however, always liable to be removed into the superior courts before judgment given, by writ of *pone*, or *accedas ad curiam*, according to the nature of the suit (*h*); and, after judgment given, by a writ of *false judgment*, requiring the courts at Westminster to rehear and review the cause (*i*); and from these circumstances (which were found productive of great vexation and delay), and also from the general inefficiency of the tribunal, the court baron fell long ago into almost entire disuse. And by the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 6, re-enacting a similar provision contained in the County Courts Act, 1846 (9 & 10 Vict. c. 95), s. 14, provision is

(*e*) 3 Bl. Com. p. 34.
(*f*) Ibid.
(*g*) Finch, 248.
(*h*) F. N. B. 4, 70; Finch, L. 444, 445; Robinson *v.* Mainwaring, 10 Q. B. 274.
(*i*) F. N. B. 18; Brown *v.* Gill, 3 D. & L. 123.

made to enable the lord of "any hundred, honor, manor, or liberty," having any court in right thereof in which debts or demands might be recovered, to surrender to her Majesty the right of holding such court; and upon such surrender being made, the court (so far as regards the recovery therein of debts and damages) is to cease. Moreover, as the court baron never ranked as a court *of record*, it fell within the 30 & 31 Vict. c. 142 (the County Courts Act, 1867), s. 28, which enacted that, from the date of that Act, no action which could be brought in any county court should thenceforth be commenced or be maintainable in any hundred or other inferior court not being a court of record; so that the jurisdiction of the court baron, considered as a court of justice, may be considered as altogether extinct; although for other purposes, it of course remains.

II. [*The Hundred Court.*—This is only a larger court baron, being held for all the inhabitants of a particular hundred, instead of a manor. The free suitors are here also the judges, and the steward, properly, the registrar,—as in the case of the freeholders' court baron (*k*); and indeed the hundred court resembles the court baron in all points, except that in point of territory the hundred court is of a greater jurisdiction (*l*). This court is said by Sir Edward Coke to have been derived out of the sheriff's county court for the ease of the people, that they might have justice done to them at their own doors, without any charge or loss of time (*m*); but its institution was probably coeval with that of hundreds themselves, which were derived from the polity of the antient Germans (*n*).] The pro-

(*k*) Bradley *v.* Carr, 3 Man. & Gr. 221.

(*l*) Finch, L. 248; 4 Inst. 267.

(*m*) 2 Inst. 71.

(*n*) Blackstone remarks (vol. iii. p. 34), with reference to the *centeni*, or inhabitants of the *hundred* among the antient Germans, that Cæsar (De Bell. Gall. l. 6, c. 22) mentions the judicial power exercised by them in their hundred courts:—"*Principes regionum, atque pago-*

ceedings in this court were also liable to removal, equally as the proceedings in the court baron, and by the same writs; and its decisions might also be reviewed by the same writ of false judgment; but in practice no resort to the hundred court has been made in recent times; and not having been a court of record, it fell under the provisions of the 30 & 31 Vict. c. 142, and 51 & 52 Vict. c. 43, s. 6; and by the effect thereof, the hundred court (excepting in the case of the hundred court of Salford) is now extinct as a court of justice.

III. *The Sheriff's County Court.*—This was a court incident to the jurisdiction of the sheriff; and it never ranked as a court of record; though from the earliest times down to the year 1846, it might have held pleas of debt or damages under the value of 40*s.* (*o*). It might also, by virtue of a special writ called a *justicies*, have entertained all personal actions to any amount; for such writ empowered the sheriff, for the sake of dispatch, to do the same justice in his county court, as might otherwise be had at Westminster (*p*); and it might also have held pleas of many "real" actions, before such actions were mostly abolished by 3 & 4 Will. IV. c. 27. The freeholders of the county were the judges in this court, the sheriff being the president only, and the officer to carry its decisions into execution (*q*); and the [great conflux of freeholders, supposed always to attend at the sheriff's county court,—which Spelman calls "*forum plebeiæ justitiæ et theatrum comitivæ potestatis*" (*r*),—is the reason why fresh Acts of

rum, inter suos jus dicunt, controversiasque minuunt." Blackstone cites, also, the following passage from Tacitus:—"*Eliguntur in consiliis et principes, qui jura per pagos vicosque reddunt: centeni singulis, ex plebe comites, consilium simul et auctoritas, adsunt*" (De Mor. Germ. c. 13); and adds, that in the Gothic constitution the hundred court was denominated *hæreda*. (Stiernhook, De Jure Goth, l. i. c. 22.)

(*o*) 4 Inst. 266; Tinniswood *v.* Pattison, 3 C. B. 243.

(*p*) Finch, 318; F. N. B. 152; Com. Dig. (C.) 5, 7, 8.

(*q*) 3 Bl. Com. p. 36.

(*r*) Gloss. v. Comitatus.

[Parliament at the end of every session were wont to be there published; why outlawries were there proclaimed; and why all popular elections which the freeholders were to make,—as formerly of sheriffs and conservators of the peace, and of coroners, verderors (*s*), and the like,—must have been made *in pleno comitatu, i.e.*, in full county court. And by the statute 2 & 3 Edw. VI. c. 25, it was enacted that this court should never be adjourned longer than for one month, consisting of twenty-eight days; and this was also the antient usage, as appears from the laws of King Edward the elder (*t*): "*præpositus* (that is, the sheriff) *ad quartam circiter septimanam frequentem populi concionem celebrato: cuique jus dicito: litesque singulas dirimito.*" In those antient times, this county court was of great dignity and splendour, the bishop and the ealdorman (or earl), with the principal men of the shire, sitting therein to administer justice, both in lay and ecclesiastical causes (*u*);] but its dignity became much impaired when the bishop was prohibited, and the earl neglected, to attend it; and in modern times little resort was made to it as a court for the recovery of debts or damages; and now its jurisdiction in this respect seems to be wholly superseded, by the creation of the modern county courts, which are the next of the inferior courts to which we shall advert (*x*).

(*s*) Reg. *v.* Conyers, 8 Q. B. 981.

(*t*) C. 11.

(*u*) Wilkins's Leg. Anglo-Sax. LL. Eadg. c. 5.

(*x*) There are certain other inferior courts of *civil* jurisdiction, besides those noticed in the text, which are now either expressly abolished or fallen into disuse. Of these we may notice:—1. *The Court of Great Sessions in Wales*, which was abolished by 11 Geo. 4 & 1 Will. 4, c. 70. 2. *The Court of the Marshalsea*, which held pleas of all trespasses committed within the verge of the court, where one of the parties was of the royal household; and of all debts and contracts, where both parties were of that establishment; which court was abolished by 12 & 13 Vict. c. 101, s. 13. 3. *The Palace Court* at Westminster, which held pleas of all personal actions arising within twelve miles of the palace at Whitehall; which court was also abolished by 12 & 13 Vict. c. 101, s. 13. 4. *The Court of Piedpoudre* (*curia pedis pulverizati*), so called from the dusty feet of the suitors frequenting

IV. *The County Courts.*—The disuse into which the contentious jurisdiction of the sheriff's county court gradually fell, was chiefly owing to the dilatory and expensive character of its proceedings, as applied to the recovery of demands of small amount; and as the remedy afforded by the superior courts was, in this respect, still more objectionable, this state of things gave rise, long ago, to the formation of courts *of request* or *of conscience* (as they were indifferently called) in various parts of the kingdom by special Acts passed for that purpose. These local courts, however, proved in their turn inadequate to the purpose,—chiefly because confined to sums of too trivial an amount, and extending only to particular places or to small districts (*y*). And the necessity being generally

the same; which is a court of record incident, by the common law, to every fair or market; and of this court, the steward of the owner of the market is the judge; with power to administer justice for all commercial injuries in that very fair or market, and not in any preceding one (3 Bl. Com. pp. 33, 34; Bac. Ab. Court of Piepoudre; Com. Dig. Market (G.)). 5. *The Forest Courts*, for the government of the royal forests in different parts of the kingdom; and for the punishment of all injuries done to the venison or deer, to the vert or greensward, and to the covert in which the deer are lodged (3 Bl. Com. p. 71; Com. Dig. Chase, R. 1, 2; Bac. Ab. Courts, Courts of the Forest; R. *v.* Conyers, 8 Q. B. 981); and 6. *The Court of Policies of Assurance*, a court established by 43 Eliz. c. 12; and 14 Car. 2, c. 23, for determining in a summary way, under commission from the Lord Chancellor, all causes concerning policies of assurance in London (3 Bl. Com. p. 75); but all questions concerning such policies are now determined in the High Court; and the statutes of Eliz. and Charles have been repealed by 26 & 27 Vict. c. 125.

(*y*) The several courts of conscience or request in existence at the date of the 9 & 10 Vict. c. 95, were in effect abolished (subject only to a few exceptions) by that statute, and the Order in Council 1847, which was subsequently issued under its authority. It was also afterwards provided, by 15 & 16 Vict. c. 54, s. 7, that on the petition of the council of any borough, or the majority of the ratepayers of any parish, within the limits of which any court of local jurisdiction other than a county court was established, her Majesty might, by order in council, exclude the jurisdiction of such local court throughout the whole, or any part, of the district of the county court existing within the same limits, so far as matters within the jurisdiction of

felt of providing throughout the whole kingdom some satisfactory mode of recovering debts and demands below the amount which would justify the expense and delay of having recourse to the superior courts (*z*),—it was conceived that for this purpose there might be advantageously established, throughout the country at large, a system of inferior courts with better machinery and a more ample jurisdiction than those hitherto in use; and which should have the name of county courts, as being in some sense a graft upon the common law court of that name. This design was carried out in the year 1846, and having been since found to work satisfactorily, the jurisdiction originally conferred on the tribunals then created has been largely increased in a variety of directions. Of the general system thus established by the 9 & 10 Vict. c. 95, and the statutes subsequently passed for its amendment or extension, a short account shall here be given (*a*); and in which account shall also be included the provisions of the County Courts Act, 1888, 51 & 52 Vict. c. 43.

The Act of 1846 directed that these new courts should be established by her Majesty in council, in such counties as she should think fit (*b*); and by an order in council of the 9th March, 1847, and by authority of the Lord

the county court were concerned; and this provision is repeated in the 51 & 52 Vict. c. 43, s. 7.

(*z*) 9 & 10 Vict. c. 95, preamble.

(*a*) These amending Acts were 12 & 13 Vict. c. 101; 13 & 14 Vict. c. 61; 15 & 16 Vict. c. 54; 19 & 20 Vict. c. 108; 20 & 21 Vict. c. 36; 21 & 22 Vict. c. 74; 22 Vict. c. 8; 28 & 29 Vict. c. 99; 29 & 30 Vict. c. 14; 30 & 31 Vict. c. 142; 38 & 39 Vict. c. 50; 45 & 46 Vict. c. 57; and 50 & 51 Vict. c. 3,—all which amending Acts (together with the principal Act, 9 & 10 Vict. c. 95) have been repealed, and re-enacted with amendments, by the County Courts Act, 1888 (51 & 52 Vict. c. 43). There are also the Acts (still unrepealed) 31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51 (conferring jurisdiction in Admiralty); and 36 & 37 Vict. c. 52 (small intestacies); and 45 & 46 Vict. c. 31 (the Inferior Courts Judgments Extension Act, 1882).

(*b*) 9 & 10 Vict. c. 95, s. 1. The courts of the universities of Oxford and Cambridge were exempted from the Act; and this exemption is continued by the 51 & 52 Vict. c. 43, s. 176.

Chancellor under a subsequent Act (*c*),—a certain number of county court *districts* have been appointed in each county; and the county court districts existing on the 1st day of January, 1889, are by the County Courts Act, 1888, s. 3, continued, subject to alterations therein and additions thereto to be made by her Majesty by further order in council. In some convenient place or places in each of the districts so appointed (*d*), the court for that county is held, as the general rule, once in every calendar month, or at such other interval (*e*) as is directed by the Lord Chancellor; and such court is constituted a court of record (*f*). The county court districts are grouped in unequal numbers into a variety of circuits (*g*); and to each of these is assigned a judge, chosen by the Lord Chancellor from amongst the serjeants, queen's counsel, and barristers-at-law of seven years' standing and upwards (*h*); and for each district, there is a registrar (*i*), with clerks and subordinate officers, including a high bailiff and assistant bailiffs (*k*).

Such being the general constitution of the County Courts, we shall now consider the practice thereof and the procedure therein, although very concisely, referring the

(*c*) 21 & 22 Vict. c. 74.

(*d*) 9 & 10 Vict. c. 95, s. 2; 51 & 52 Vict. c. 43, s. 10.

(*e*) In some of the smaller districts, the court is held only once in every two or every three months; while in other districts, the court sits at several times during the month, according to the exigency of business.

(*f*) 51 & 52 Vict. c. 43, s. 5, re-enacting 9 & 10 Vict. c. 95, s. 3.

(*g*) For the circuit which includes the district of Liverpool, there are two judges.

(*h*) The judge is allowed to appoint a deputy, being a barrister of seven years' standing, in case of his own illness or unavoidable absence. (See 51 & 52 Vict. c. 43, s. 18, re-enacting 9 & 10 Vict. c. 95, s. 20; 19 & 20 Vict. c. 108, ss. 6—11.)

(*i*) The registrar (who must be a solicitor of five years' standing) is appointed by the judge, subject to the approval of the Lord Chancellor; a deputy registrar may be appointed by the registrar, subject to the approval of the judge. (51 & 52 Vict. c. 43, ss. 25, 29, 31.)

(*k*) See 51 & 52 Vict. c. 43, ss. 33—37, re-enacting 9 & 10 Vict. c. 95, ss. 3, 9, 23, 24, 31; 19 & 20 Vict. c. 108, ss. 6—17.

student and practitioner for fuller details to the provisions contained in the County Courts Act, 1888, and to the rules of 1889 made thereunder (*l*). And firstly, as regards the choice of the court in which the plaintiff is to sue, or bring his plaint,—it is provided that the plaintiff may enter his claim in the county court within the district of which the defendant shall dwell or carry on business at the time of bringing the action (*m*),—or (by leave of the judge or registrar) in the county court within the district of which such defendant shall have dwelt or carried on business within the six calendar months next preceding,—or (by the like leave) in the county court within the district of which the cause of action wholly or in part arose, without regard to the place of residence or business of the defendant (*n*). But as regards actions relating to mortgages on lands, and to the partition of lands, the court is to be that of the district within which the lands are situate (*o*); and as regards actions relating to the administration of the estates of deceased persons, the court is to be either that of the domicile of the deceased or that of the district in which his executors or administrators reside (*o*).

Secondly, as regards the kinds and classes of action which may be brought in the county courts,—the jurisdiction conferred on these courts is, primarily and principally, for the recovery of small debts and demands; and such jurisdiction includes generally all personal actions where the debt, damage, or demand claimed is not more than 50*l*., whether on balance of account or otherwise (*p*). But

(*l*) The Rules of 1889 came into force on the 1st Feb. 1889; and they have been variously altered and amended by the County Court Rules of Feb. 1892 and of July, 1892, which came into force respectively on the 1st March, 1892, and 1st October, 1892, but all these Rules of 1892 are to be cited as the Rules of 1889.

(*m*) As to the *metropolitan* districts, see 51 & 52 Vict. c. 43, s. 84, re-enacting 19 & 20 Vict. c. 108, s. 18; 30 & 31 Vict. c. 142, s. 3.

(*n*) 51 & 52 Vict. c. 43, s. 74, re-enacting 30 & 31 Vict. c. 142, s. 1, which was in substitution for 9 & 10 Vict. c. 95, s. 60.

(*o*) 51 & 52 Vict. c. 43, s. 75.

(*p*) Ibid. ss. 56, 57, re-enacting

if the plaintiff's claim exceeds 20*l.* in an action on any contract, or 10*l.* in any action of tort, the defendant may object to the county court dealing with the action; and in such a case, on his giving the prescribed security and obtaining the judge's certificate that some important question of law or fact is likely to arise, he may have a stay of the proceedings in the county court (*q*). Also, actions of ejectment may be brought in the county court, where neither the value nor the rent of the tenement exceeds 50*l.* (formerly 20*l.*) by the year, although in this case the defendant may remove the action into the High Court, under an order of the High Court to be obtained by him for the purpose, on the ground that the title to lands of greater annual value than 50*l.* will be affected by the decision (*r*). Also, actions in which the title to any corporeal or incorporeal hereditament comes in question, may (subject to the same limit of 50*l.*) be tried in the county court (*s*); and in any action in which the title to any corporeal or incorporeal hereditament, or to any *toll*, *fair*, *market*, or *franchise*, comes incidentally in question, if in such a case both parties consent, the judge may decide the claim which is the principal (or immediate) object of the action; and in such a case, the decision on the incidental question of title is not to be evidence of title in any other action (*t*). But save as aforesaid, the county court has no

9 & 10 Vict. c. 95, s. 58; 13 & 14 Vict. c. 61; 19 & 20 Vict. c. 108, s. 24. As to the action of *replevin*, see 51 & 52 Vict. c. 43, ss. 133—137, re-enacting 9 & 10 Vict. c. 95, s. 119; 19 & 20 Vict. c. 108, s. 66; and as to the recovery of small tenements, see 51 & 52 Vict. c. 43, s. 138 (where term expired or duly determined by notice to quit), and ss. 139—143 (where action is for non-payment of rent).

(*q*) 51 & 52 Vict. c. 43, s. 62, re-enacting a similar provision in 19 & 20 Vict. c. 108, s. 39.

(*r*) 51 & 52 Vict. c. 43, s. 59, re-enacting 9 & 10 Vict. c. 95, s. 58; and 30 & 31 Vict. c. 142, ss. 11, 12; and see Brown *v.* Cocking, Law Rep., 3 Q. B. 672; Elston *v.* Rose, 4 Q. B. 4; Tomkins *v.* Jones, 22 Q. B. D. 599.

(*s*) 51 & 52 Vict. c. 43, s. 60, re-enacting 9 & 10 Vict. c. 95, s. 58; and see Pearson *v.* Glazebrook, Law Rep., 3 Exch. 27.

(*t*) 51 & 52 Vict. c. 43, s. 61.

jurisdiction in ejectment, or in actions involving title to corporeal or incorporeal hereditaments (*x*); also, the court has no jurisdiction in actions for libel, slander, seduction, or breach of promise of marriage (*y*); and no action may be brought in the county court on any judgment of the High Court (*z*). And by 51 & 52 Vict. c. 43, s. 66, re-enacting a similar provision in 30 & 31 Vict. c. 142, s. 10, the defendant in any action in the High Court for malicious prosecution, illegal arrest, illegal distress, assault, false imprisonment, libel, slander, seduction, or other tort, may, upon affidavit that the plaintiff has no visible means to pay the costs of the action, obtain an order of the High Court removing the action into the county court, unless the plaintiff gives security for the costs of the action, or satisfies the judge of the High Court that the action is one proper to be tried in the High Court (*a*).

In order to utilize more fully the county courts in cases proper to be there tried, it has now, for the first time, been provided, that in any action *of contract* brought in the High Court wherein the claim endorsed on the writ does not exceed 100*l.* (formerly 50*l.*), or where such claim, though it originally exceeded that amount, is reduced by payment, an admitted set-off, or otherwise, to a sum not exceeding that amount, a judge of the High Court may, on the application of either party at any time, order the action to be tried in any county court; and, in fact, unless there is good cause to the contrary, the judge is required to make such order (*b*); and (with the same object) it has been further provided that, if in any action in the High Court the plaintiff shall recover a sum less than 20*l.* (if the action be

(*x*) Tomkins *v.* Jones, 22 Q. B. D. 599.

(*y*) 51 & 52 Vict. c. 43, s. 56, re-enacting 9 & 10 Vict. c. 95, s. 58.

(*z*) 51 & 52 Vict. c. 43, s. 63.

(*a*) Craven *v.* Smith, Law Rep., 4 Exch. 146; Gray *v.* Wish, ib. 4 Q. B. 175; Lewis *v.* Sanderson, ib. 330; Sampson *v.* Mackay, ib. 643.

(*b*) 51 & 52 Vict. c. 43, s. 65, re-enacting a somewhat similar provision in 19 & 20 Vict. c. 108, s. 26; and see Scutt *v.* Freeman, 2 Q. B. D. 177; Curtis *v.* Stovin, 22 Q. B. D. 513.

founded on contract), or 10*l.* (if founded on tort), he shall not be entitled to any costs of the action; and if he recover a sum of 20*l.*, but less than 50*l.* (on contract), or a sum of 10*l.*, but less than 20*l.* (on tort), he shall be entitled only to county court costs of action,—unless the judge certifies that there was sufficient reason for bringing the action in the High Court, or unless the Court or a judge at chambers shall, by order, allow such costs (*c*). But if in such a case, the action being founded on contract, the plaintiff within twenty-one days after the service of the writ obtains an order under Order XIV. rule 1, to enter up judgment for a sum of 20*l.* or upwards, he is to be entitled to his costs according to the scale for the time being in use in the High Court.

Also, by 47 & 48 Vict. c. 61, s. 17, interpleader proceedings in the High Court, when the amount or value of the matter in dispute does not exceed 500*l.*, may, at the discretion of the judge of the High Court, be transferred into the county court, and the transfer is to have the same effect as a transfer under sect. 8 of the County Courts Act, 1867 (now sect. 69 of the County Courts Act, 1888), which (as hereinafter more particularly mentioned) provides for the transfer of certain classes of equitable actions from the High Court into the county court.

Lastly, in order to still further encourage the prosecution of actions in the county court, it is provided by sect. 119 of the County Courts Act, 1888, re-enacting a similar provision in the 45 & 46 Vict. c. 57, that the judge of that court may in any proper case award costs on a higher scale than that which would otherwise be applicable, however small the amount recovered, provided he certify that the action involved a novel or difficult point of law, or that the

(*c*) 51 & 52 Vict. c. 43, s. 116, re-enacting (with amendments) a somewhat similar provision in 30 & 31 Vict. c. 142, s. 5; and see 51 & 52 Vict. c. 43, s. 117, re-enacting 30 & 31 Vict. c. 142, s. 29, which contained a similar enactment with regard to actions brought unnecessarily in inferior courts (other than the county court) and in which less than 10*l.* was recovered.

question litigated was of importance to some class or body of persons, or of general or public interest.

Regarding the mode of proceeding in the county courts, while referring the reader to the rules themselves regulative of that practice, we may here mention generally:—That the first step in the proceedings is, in general, to enter a *plaint* in a book kept by the registrar for the purpose (*d*), to be followed by a *summons*, served on the defendant; and upon the day in that behalf named in the summons, the plaintiff must appear to support his claim, and the defendant must also appear to make his defence, otherwise the plaintiff, on proving his case in court, shall have judgment; and if the plaintiff shall (by leave in that behalf) have issued a *default summons*, then, unless the defendant gives notice of defence, the plaintiff, at the end of eight (formerly sixteen) days from the time of service, may sign judgment without further proof (*e*). And in the ordinary case, the defendant must give notice of (if he intends to rely upon) any special defence to the action; that is to say, if he intends to set off (or to set up, by way of counterclaim) any debt or demand, or to set up, by way of defence, the fact of infancy, coverture, the statute of limitations, or discharge in bankruptcy (*f*). And upon both parties to the action answering to their names, on the case being called on, the judge proceeds in a summary way to try it, and gives judgment upon such evidence—taken *vivâ voce* and upon oath—as the parties on either side shall adduce, it being provided, that the judge, at the hearing, shall himself determine all questions, as well of fact as of law, unless a jury shall be summoned (*g*). But when the amount claimed exceeds 5*l*., a jury shall be summoned, at the requisition either of plaintiff or defen-

(*d*) 51 & 52 Vict. c. 43, s. 73, re-enacting 9 & 10 Vict. c. 95, s. 59.

(*e*) 51 & 52 Vict. c. 43, s. 86.

(*f*) 51 & 52 Vict. c. 43, s. 82, re-enacting 9 & 10 Vict. c. 95, s. 76.

(*g*) 51 & 52 Vict. c. 43, ss. 79, 100, re-enacting 9 & 10 Vict. c. 95, s. 69.

dant; and even where it does not exceed 5*l.*, a jury may be summoned at the discretion of the judge, on the application of either of the parties (*h*),—such jury (in either case) to consist of five persons qualified to serve as jurors at the trial of issues of fact arising in actions pending in the High Court of Justice; and the jury must be unanimous in their verdict (*i*). When the judge at such hearing adjudges a sum of money to be paid by one party to the other by instalments or otherwise, and the order for payment is not complied with, execution may issue against the goods of the judgment debtor (*k*); and if such debtor has the means to pay at the date of the judgment, or at any time afterwards, and fails to do so,—he may, on his ability to pay being established to the satisfaction of the judge, be committed to prison for any period not exceeding forty days, though he may obtain his liberty at any time by paying the sum ordered,—the mode of proceeding to obtain his committal being to issue a *judgment summons*, requiring him to show cause why he does not pay the sum for which the judgment was obtained; or if such sum was ordered to be paid by instalments, why he does not pay the instalments. On the hearing of the *judgment summons*, a new order may be made as to the mode of payment of the sum for which the judgment was obtained, if the judge shall think fit to vary his original order; but no second commitment can be made in respect of the same default (*l*); and by 51 & 52 Vict. c. 43, s. 153, for inability to pay the judgment, or any instalment, when such inability arises from sickness or other sufficient cause, the judge may suspend the judgment, and even discharge the debtor (*m*).

And it is to be here observed, that the execution upon a

(*h*) 51 & 52 Vict. c. 43, s. 101, re-enacting 9 & 10 Vict. c. 95, s. 70.

(*i*) 51 & 52 Vict. c. 43, s. 102, re-enacting 9 & 10 Vict. c. 95, ss. 72, 73.

(*k*) 51 & 52 Vict. c. 43, s. 146.

(*l*) Evans *v.* Wills, 1 C. P. D. 229.

(*m*) 32 & 33 Vict. c. 62; 41 & 42 Vict. c. 54.

judgment of one county court, against the debtor within the district of another county court, in England, may be effectuated by such latter court, provided it have received, and duly sealed with its own seal, the warrant, duly attested, of the first county court to proceed to such execution (*n*). And if a judge of the High Court is satisfied that the debtor has no goods or chattels convenient to satisfy the judgment obtained in the county court, he may order a writ of *certiorari* to issue for the removal of the judgment into the High Court, for the purposes of execution against the lands of the debtor or otherwise (*o*). And, by the Inferior Courts (Judgments Extension) Act, 1882 (45 & 46 Vict. c. 31), the judgment of a county court in England may be executed in any other part of the United Kingdom by the corresponding court in such other place, provided a certificate of the judgment be first registered in such other corresponding court.

Finally, it is to be observed, that it is competent to the judge, after having given his decision, to accede, if he so think fit, to an application that there shall be a new trial, and he may impose such terms as he shall think reasonable (*p*). Also, although no appeal lies from the finding of any *fact* by the judge (*q*), if either party to the action is dissatisfied with the determination or direction of the judge in point of *law* or *equity*, or upon the admission or rejection of any evidence, he may appeal to the High Court (*r*), in such mode (*scil.* by motion on notice) as is for the time being provided in that behalf by the rules of the High Court of Justice (*s*); which appeal is to a divisional

(*n*) 51 & 52 Vict. c. 43, s. 158.

(*o*) Ibid. s. 151.

(*p*) Ibid. s. 93, re-enacting 9 & 10 Vict. c. 95, s. 89.

(*q*) Cousins *v.* Lombard Bank, 1 Ex. D. 401.

(*r*) Warner *v.* Riddeford, 4 C. B. (N. S.) 180; Carr *v.* Stringer, 1 Ell., Bl. & Ell. 123; Stone *v.* Dean, ib. 504; Waterton *v.* Baker, Law Rep., 3 Q. B. 173; Gage *v.* Collins, ib. 2 C. P. 381; Francis *v.* Dowdeswell, ib. 9 C. P. 423; Turner *v.* Great Western Railway Company, 2 Q. B. D. 125; Mayer *v.* Turner, 3 Ex. D. 235.

(*s*) 51 & 52 Vict. c. 43, s. 120.

court of the Queen's Bench Division (*t*); but no appeal will lie, if before the decision is pronounced both parties shall have agreed in writing that the decision of the judge shall be final (*u*); and there is in no case (unless by special leave of the judge) any right of appeal, in an action of contract or tort (other than in ejectment or in actions involving title to land) where the debt or damage claimed does not exceed 20*l.*, nor in any action of replevin where the amount of rent or value of the goods does not exceed 20*l.*, nor in any action for the recovery of tenements, where the yearly rent or value does not exceed 20*l.*, nor in interpleader proceedings, where the money claimed or the value of the goods does not exceed 20*l.* (*x*).

The scope of the county courts was at first confined, with regard to their ordinary and litigious jurisdiction, to such matters as could be concurrently brought in one of the superior courts in which law was administered as distinct from equity; but as their convenience became more appreciated, the opinion gained ground, that it would be desirable to confer on them a jurisdiction also in cases involving questions of *equity* where comparatively small interests were involved, and which would otherwise have to be entertained, if at all, through the expensive and dilatory method of chancery proceedings; and for this purpose there was passed, in the year 1865, the 28 & 29 Vict. c. 99, entitled "An Act to confer on the County Courts a limited Jurisdiction in Equity." That statute has since been repealed, and its provisions (with certain amendments) re-enacted by the County Courts Act, 1888; and under the last-mentioned Act (*y*), the county court has

(*t*) 36 & 37 Vict. c. 66, s. 45; Rules of Supreme Court, 1883, Order lix. rules 4—8; and the further rules 9 to 17, issued in December, 1885; 51 & 52 Vict. c. 43, ss. 121, 122.

(*u*) 51 & 52 Vict. c. 43, s. 123, re-enacting 19 & 20 Vict. c. 108, s. 69.

(*x*) 51 & 52 Vict. c. 43, s. 120.

(*y*) Ibid. s. 67; 28 & 29 Vict. c. 99, s. 1.

now (concurrently with the High Court) (*z*), all the powers and authority of the High Court of Justice itself in the following matters: 1. Administration suits wherein the estate does not exceed in value the sum of 500*l.* (*a*); 2. Suits for the execution of trusts in which the estate or fund does not exceed the same amount (*b*); 3. Foreclosure and redemption suits, or for enforcing any charge or lien, where the mortgage, charge, or lien shall be within such limit; 4. Suits for the specific performance, or for the rectification, of agreements where the property sold or leased does not exceed that amount in value (*c*); 5. Proceedings under the Trustee Relief Acts (or now the Trustee Act, 1893), with a similar qualification as to the value of the property; 6. Proceedings as to the maintenance or advancement of infants,—with a similar qualification; 7. Suits for the dissolution or winding-up of partnerships,—the assets not exceeding such amount; and 8. Actions for relief against fraud or mistake, in which the damage sustained, or the estate or fund in respect of which relief is sought, does not exceed 500*l.* (*d*). Also, by sect. 69 of the County Courts Act, 1888, re-enacting sect. 8 of the County Courts Act, 1867, the High Court in its Chancery Division may, on the application of any party to the action proceeding therein, or *mero motu*, order a transfer of such action into the county court, provided it be one within the jurisdiction of the county court as above defined, and thereafter the action proceeds in the county court precisely as if it had been originally commenced therein. And it is provided, by sect. 68 of the County Courts Act, 1888, that if, during the progress of

(*z*) Brown *v.* Rue, Law Rep., 17 Eq. Ca. 343.

(*a*) Turner *v.* Rennoldson, Law Rep., 16 Eq. Ca. 37.

(*b*) Clayton *v.* Renton, Law Rep., 4 Eq. Ca. 158.

(*c*) Wilson *v.* Marshall, Law Rep., 3 Eq. Ca. 270.

(*d*) By 51 & 52 Vict. c. 43, s. 71, re-enacting 30 & 31 Vict. c. 142, s. 26, any money paid into a county court in equitable proceedings is to be invested by the registrar, within forty-eight hours, in the post-office savings bank of the town.

an action proceeding in the county court on its equitable side, it appears that the limit of that court's jurisdiction is exceeded, the judge of the county court shall transfer the action (as regards its subsequent stages), to the High Court, Chancery Division; or either party may obtain an order of the Chancery Division directing the continued prosecution of the action in the county court, notwithstanding the excess of the jurisdiction.

In the year 1868 the policy of increasing the jurisdiction of the county courts received a still further development, by conferring upon such of them as are held in the neighbourhood of the sea a limited jurisdiction in admiralty; and this was carried into effect by the 31 & 32 Vict. c. 71, amended by the 32 & 33 Vict. c. 51 (*e*). The jurisdiction thus conferred extends to the following matters (*f*):— 1. Salvage; 2. Claims for towage, necessaries, or wages; 3. Claims for damage to cargo, or by collision; and, 4. Claims arising out of agreements made in relation to the use or hire of any ship, or to the care of goods therein, or to any claim in tort in respect of goods carried therein.

Also, in the year 1869, when the bankruptcy law was remodelled, the administration thereof was entrusted (except in the district of the London Court of Bankruptcy) to certain of the county courts, by the statute 32 & 33 Vict. c. 71, being the Bankruptcy Act of that year (*g*); and

(*e*) Hewitt *v.* Cory, Law Rep., 5 Q. B. 418.

(*f*) By this Act, only such admiralty jurisdiction is conferred on the county court as is also enjoyed by the Admiralty Division of the High Court (see Gunnestadt *v.* Price, Law Rep., 10 Exch. 65, overruling Cargo ex Argos, ib. 5 P. C. 134).

(*g*) By 32 & 33 Vict. c. 71, s. 59, the court "having jurisdiction in bankruptcy" is defined to be (beyond the London bankruptcy district) the county court of the district wherein the debtor resides or carries on his business; but by sect. 79, the Lord Chancellor was enabled, by order, to exclude any county court from having jurisdiction in bankruptcy, and for the purpose of bankruptcy to attach its district to any other county court. Accordingly, under such an order, bearing date 1st January, 1870, the jurisdiction in bankruptcy was centralized in certain convenient districts, to the exclusion of

this jurisdiction is continued in the county courts, by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52) (*h*).

Finally, it is to be noticed, that as all the county courts have thus jurisdiction both at law and in equity, and certain of them jurisdiction in admiralty also, and in bankruptcy, these courts come within the enabling provisions of the Judicature Acts, already mentioned, with reference to inferior courts generally; and hence every county court, so far as regards all causes of action within its jurisdiction, has the same powers as the High Court of Justice itself (*i*).

In addition to the jurisdictions already mentioned, the judges of the county courts have a variety of others,—some of which are of an original, and others of an auxiliary kind. But, as these are numerous, and are moreover unconnected in general with the main object for which these courts have been established, no specific account of them shall here be attempted (*k*).

the other county court districts; and these divisions (subject to the like power of alteration) have been maintained under the Bankruptcy Act, 1883, s. 92.

(*h*) Sects. 92, 100, 102. The appeal from the county court in bankruptcy is to a divisional court of the High Court (47 & 48 Vict. c. 9, amending s. 104 of the Bankruptcy Act, 1883).

(*i*) Davis *v.* Flagstaff Company, 3 C. P. D. 228; Martin *v.* Bannister, 4 Q. B. D. 491; 44 & 45 Vict. c. 68, s. 27; 47 & 48 Vict. c. 61, ss. 23, 24.

(*k*) As regards the miscellaneous jurisdiction of the county courts, see (among other Acts) 16 & 17 Vict. c. 51 (The Succession Duties Act, 1853);—c. 137 (The Charitable Trusts Act, 1853);—17 & 18 Vict. c. 112 (The Literary and Scientific Institutions Act, 1854);—19 & 20 Vict. c. 108, s. 73 (Acknowledgments of Married Women);—21 & 22 Vict. c. 95, ss. 10, 13 (Probates and Administrations);—23 & 24 Vict. c. 136 (The Charitable Trusts Act, 1860);—25 & 26 Vict. c. 89, s. 126 (The Companies Act, 1862);—36 & 37 Vict. c. 52, and 38 & 39 Vict. c. 27 (Small Intestates' Estates);—37 & 38 Vict. c. 42 (The Building Societies Act, 1874);—38 & 39 Vict. c. 55 (The Public Health Act, 1875);—c. 60 (The Friendly Societies Act, 1875);—c. 87 (The Land Transfer Act, 1875);—c. 90 (The Employers and Workmen Act, 1875);—39 & 40 Vict. c. 45 (The Industrial and Provident Societies Act, 1876);—c. 75 (The Rivers Pollution Prevention Act, 1876);—45 & 46 Vict. c. 38 (Settled Land Act, 1882);—c. 43 (Bills of Sale Act,

V. *Borough Courts.*—The several courts which exist within many of the cities, boroughs, and corporations throughout the kingdom, and which are held by prescription, charter, or Act of Parliament, next come under consideration (*l*). These local courts arose originally from the favour of the crown to particular districts, the intention thereof being that the inhabitants might prosecute their suits and receive justice at home (*m*). And by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), re-enacting a similar provision in the Municipal Corporations Act, 1835 (5 & 6 Will. IV. c. 76), in those boroughs to which that Act extends and in which there is a separate court of quarter sessions, the recorder is in the general case constituted, by virtue of his office, the judge of any court of record for civil actions existing within the borough;

1882);—c. 75 (Married Women's Property Act, 1882);—46 & 47 Vict. c. 61 (Agricultural Holdings Act, 1883);—49 & 50 Vict. c. 27 (Infants' Guardianship);—c. 38 (Riot, Damages, Act, 1886);—50 & 51 Vict. c. 57 (Deeds of Arrangement Act, 1887);—c. 58 (Coal Mines Regulation Act, 1887);—51 & 52 Vict. c. 21 (Distress for Rent);—53 Vict. c. 5 (Lunacy Act, 1890);—53 & 54 Vict. c. 63, s. 1 (The Companies, Winding up, Act, 1890);—56 & 57 Vict. c. 39 (Industrial and Provident Societies);—57 & 58 Vict. c. 47 (Building Societies);—c. 60 (Merchant Shipping).

(*l*) The chief of these within the *City of London* are (1.) The *Court of Hustings*,—a tribunal analogous to the sheriff's county court; (2.) The *Lord Mayor's Court*,—as to which see The Lord Mayor of London *v.* Cox, Law Rep., 2 H. L. 239; Davies *v.* MacHenry, ib. 3 Ch. App. 200; Davis *v.* Flagstaff Mining Co., 3 C. P. D. 228; Paine *v.* Slater, 11 Q. B. D. 120; Alderton *v.* Archer, 14 Q. B. D. 1; and the statute 20 & 21 Vict. c. clvii, by which the practice and procedure of this court were amended and its powers enlarged; also The Mayor's Court of London, Rules 1892; and (3.) The *City of London* (formerly called the *Sheriffs'*) *Court*, which is now a county court. (See 51 & 52 Vict. c. 43, s. 185, re-enacting 30 & 31 Vict. c. 142, s. 35.)

(*m*) A detailed statement as to all the borough and other local courts throughout the kingdom, as they existed prior to the year 1846, showing the extent of their jurisdiction, the authority under which they were usually held, and their forms of process, &c.—will be found in the Fourth Report of the Common Law Commissioners appointed in 1828, Appendix, Part II.

and the statute contains also provisions to regulate the jurisdiction of such courts of record, and the qualification and summoning of the jurors therein (*n*).

The statute 2 & 3 Vict. c. 27, for regulating the proceedings in the borough courts of England and Wales, required that every borough court of record should be open, for the trial of issues of fact and of law, four times at least in each year, and with no greater interval than four calendar months. But the statute 15 & 16 Vict. c. 54, being the County Courts Act, 1852, by sect. 7, provided that the council of any borough, or the ratepayers of any parish, within the limits of which any local court other than a county court was established, might petition the crown for the exclusion from such local court of all causes whereof the county court of the district had cognizance; and the provisions of this statute (as has been in fact already observed) are continued by the County Courts Act, 1888, s. 7. Moreover, the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 29, enacted, that where any action which could have been brought in a county court, should, instead of being there brought, be brought in some other inferior court, and the verdict recovered should be for a less sum than 10*l.*, the plaintiff should have no more costs from the defendant than if the proceeding had been in the county court, unless the judge before whom it was tried should certify that the action was properly brought in his court; and this enactment, although repealed by the County Courts Act, 1888, is in substance re-enacted by sect. 7 of the last-mentioned Act, but without any provision enabling the judge of the local court to grant his certificate for the costs; all which enactments had and have for their obvious tendency and object the discontinuance of these local jurisdictions.

(*n*) 45 & 46 Vict. c. 50, ss. 162—169. The Common Law Procedure Acts, 1852, 1854, and 1860, contained provisions for regulating, by order in council, the procedure in county courts, and also in other local or inferior courts; and orders in council in that behalf were from time to time issued accordingly.

On the other hand, some of them being found to work usefully and to be worth preserving, provisions were made, in the year 1872, with the object of giving them greater vitality, and so as to secure more efficiency in their proceedings; that is to say, by the Borough and Local Courts Act of that year (35 & 36 Vict. c. 86), it was enacted, that in all cases of final judgment obtained therein for debt or damage not exceeding twenty pounds, exclusive of costs, the local court might send a writ or precept for the recovery of the same to the registrar of any county court within the jurisdiction of which the defendant had any goods or chattels, and the writ or precept was thereupon to be executed by the high bailiff of the county court, and a return to be made to the bailiff or serjeant at mace of the local court (*o*). The Act also contained provisions enabling the judge to appoint a deputy or assistant judge, being a barrister of not less than seven years' standing (*p*); and otherwise provided for the greater efficiency of the court (*q*), and for securing regularity in its proceedings; and in particular, there was contained in the schedule to the Act a series of minute provisions having reference chiefly to the course of the court, including the statement of special cases by the parties in any action after issue joined, by consent or by order of the registrar, for the opinion of the High Court of Justice; and providing also for the removal of judgments or orders for not less than twenty pounds, exclusive of costs, into the High Court, and for the settlement by the judge (subject to the approval of two judges of the High Court) of the fees to be taken by the bailiff, the registrar, and other officers of the court. And the statute 46 & 47 Vict. c. 49, s. 8, has provided that her Majesty may from time to time, by order in council, extend to any inferior court of civil jurisdiction (just as by the statute 44 & 45 Vict. c. 68, s. 27,

(*o*) 35 & 36 Vict. c. 86, s. 6. And see 45 & 46 Vict. c. 31.

(*p*) 35 & 36 Vict. c. 86, s. 7.

(*q*) Sect. 4.

she is enabled te extend to county courts) any of the provisions of the Judicature Act, 1873, and of the Acts amending that Act; and the statute 47 & 48 Vict. c. 61 (the Judicature Act, 1884) has provided more effectually for bringing about a uniformity of procedure in all inferior courts, and for ensuring the conformity, more or less, of the rules of practice therein to the rules of the Supreme Court,—sect. 24 of that Act having subjected the rule-making authorities of all inferior courts to the control of the Rule Committee of the Supreme Court hereinafter referred to (*r*). In conclusion, we will only add, that all appeals from borough and other local courts (as from other inferior courts) are to a divisional court of the High Court of Justice (*s*).

VI. *The Courts of the Commissioners of Sewers.*—These tribunals were originally erected by virtue of a commission under the great seal pursuant to the Statute of Sewers (23 Hen. VIII. c. 5); which statute was subsequently amended by the 13 Eliz. c. 9, and (in more recent years) by the statutes 3 & 4 Will. IV. c. 22; 4 & 5 Vict. c. 45, and 12 & 13 Vict. c. 50 (*t*). Under these statutes, the powers of the Commissioners are confined to such county or particular place as the commission names; and their jurisdiction extends to overlooking the repairs of the banks and walls of the sea coast and of navigable rivers, (and, with the consent of a certain proportion of the owners and occupiers, to the making of new embankments,) and also to the cleansing of all such rivers and the streams communicating therewith. The City of London has a separate Commission of Sewers under the

(*r*) Vide infra, p. 353, n. (*a*).

(*s*) 36 & 37 Vict. c. 66, s. 45; 47 & 48 Vict. c. 61, s. 23; Rules of the Supreme Court, 1883, Ord. lix. r. 1; also, rr. 9 to 17 (Dec. 1885); and 57 & 58 Vict. c. 16, s. 1, sub-s. 5.

(*t*) Callis on Sewers; Emerson *v.* Saltmarche, 7 Ad. & Ell. 266; Taylor *v.* Loft, 8 Exch. 269; The Queen *v.* Baker, Law Rep., 2 Q. B. 621.

statute 7 Anne, c. 9; and there are also special statutes regulating the sewers in the metropolis (*u*).

[These commissioners are a court of record, and consequently may fine and imprison for contempt (*x*); and in the execution of their duty, they may proceed either by jury, or upon their own view; and may take order for the removal of any annoyances, or for the safeguard and conservation of the sewers within their commission, either according to the laws and customs of Romney-marsh or otherwise at their own discretion (*y*). They may also assess such rates, or scots, upon the owners of lands within their district as they shall judge necessary; and, in case of refusal to pay, may levy the same by distress of the goods and chattels, or by sale of the lands of such owners (*z*).]

By the statute 24 & 25 Vict. c. 133,—an Act passed chiefly with reference to the drainage of land for agricultural purposes, provision has been made for the constitution, with the consent of the inclosure commissioners, of *elective drainage districts* throughout the country and for vesting all matters of drainage (within each district) in a board having the same powers as the commissioners of sewers, but so that no such district may be made within the limits of any commission of sewers, or of any borough or district under a local board of health, or improvement commissioners, without the consent of the commissioners, council, or board, as the case may be (*a*); and it is thereby made lawful for Her Majesty, upon the recommendation

(*u*) 18 & 19 Vict. c. 120, ss. 146—148; 21 & 22 Vict. c. 104, s. 1; 25 & 26 Vict. c. 102, ss. 1, 2—6, 22, 44—57, 59, 61, 66, 68, 69; 32 & 33 Vict. c. 102; 51 & 52 Vict. c. 41.

(*x*) Inhabitants of Oldbury *v.* Stafford, 1 Sid. 145.

(*y*) Romney-marsh, in the county of Kent, a tract containing 24,000 acres, is governed by certain antient and equitable laws of sewers, composed by Henry de Bathe, a venerable judge in the reign of King Henry the third. (4 Inst 276.)

(*z*) 23 Hen. 8, c. 5; 3 & 4 Will. 4, c. 22; 4 & 5 Vict. c. 45; 12 & 13 Vict. c. 50, ss. 2, 7; 24 & 25 Vict. c. 133, s. 38; Griffiths *v.* Longden Drainage Board, L. R., 6 Q. B. 738; The Queen *v.* Commissioners for Essex, 14 Q. B. D. 561.

(*a*) Sect. 63; 38 & 39 Vict. c. 55, s. 327.

of the inclosure commissioners, to direct commissions of sewers into all parts of England, *inland* as well as maritime, and to assign as the limits for their jurisdiction any areas which, having regard to facilities for draining, may be thought the most expedient; and it is enacted, that the powers of the commissioners shall extend not only to the maintenance and improvement of existing works with reference chiefly to sewers and other *watercourses* (*b*), outfalls, and defences against water, but also to the construction of new ones; but where land requires to be purchased for new works otherwise than by agreement with the owner thereof, the commissioners must obtain the sanction of parliament (*c*); and other provisions are made for ensuring due compensation to owners whose property is interfered with for the purposes of the Act (*d*). Also,—by the Brine Pumping (Compensation for Subsidence) Act, 1891 (54 & 55 Vict. c. 40), a board of commissioners has been incorporated, for every compensation district to be formed under the provisions of that Act, for the purpose of awarding compensation for subsidence damage to lands and buildings occasioned by the withdrawal of the support of the brine thereto; and the commissioners have certain of the powers of a court, and may also levy rates for providing the compensation awarded,—the whole administration of the Act being placed under the control of the Local Government Board.

The Commissioners of Sewers, although a court of great antiquity and invested with an extensive and somewhat arbitrary jurisdiction, is yet but an inferior court, and as such is amenable to the superior guidance of the Queen's Bench Division of the High Court of Justice (*e*).

(*b*) *Watercourse* in this Act includes "all rivers, streams, drains, sewers, and passages through which water flows." (Sect. 3.)

(*c*) 24 & 25 Vict. c. 133, ss. 22—26.

(*d*) Sects. 18 et seq.

(*e*) Smith's case, 1 Ventr. 66; The case of Cardiff Bridge, Salk. 146; Hetley *v.* Boyer, Cro. Jac. 336; 36 & 37 Vict. c. 66, s. 45; Rules of the Supreme Court, 1883, Ord. lix. r. 1.

It is true, that at one time this was questioned, it having been supposed that the commissioners were answerable to none but to the king in council; and King James the first with his privy council even proceeded so far as to order, that no action or complaint should be prosecuted against the commissioners of sewers, unless before the council itself (*f*),—the reason upon which this order proceeded having been the public safety (*salus populi suprema lex*); and Sir Edward Coke, the Lord Chief Justice of that reign, for having protested strenuously, but without much tact, against this application of that principle, was even deprived of his office,—to such lengths may differences of constitutional sentiment, when untempered with sobriety, lead the wisest of our sovereigns and the most learned and able of our judges. But it is now well settled, that the court is an inferior court; and as such it is subject to the control of the rule committee of the High Court, under the statutes hereinbefore in that behalf mentioned in connection with borough and other local courts (*g*).

VII. *The Court of the Stannaries of Cornwall and Devon.*—This is a court established for the administration of justice, primarily among the tinners within these two counties; and it is a court of record, and [is held before a judge called the vice-warden; and it is founded on an antient privilege granted to the workers in the tin mines, to sue and be sued in their own court, so that they may not be drawn from their business, to their own private loss and to the public detriment, by attending their lawsuits in other courts (*h*). The privileges of the tinners were confirmed by a charter of the thirty-third year of Edward the first, and were fully expounded in a private statute which is set forth in the Institutes (*i*), and which was afterwards explained by a public Act, namely, the 16 Car. I. c. 15.

(*f*) 1616, Nov. 8th.
(*g*) Vide supra, p. 328.
(*h*) 4 Inst. 232.
(*i*) Ibid.

[There were originally distinct courts for the two counties; but by recent statutes, they have been united into one court, and their procedure has been regulated (*k*).

The jurisdiction of the court may be stated as follows:— All tinners and labourers in and about the stannaries, during the time of their working therein *bonâ fide*, may sue and be sued in this court, in all matters arising within the stannaries, excepting pleas of land, life, and member;] and until the year 1846 (when the modern county courts were established as is hereinbefore mentioned), these persons, as regards all such matters, were privileged not to be sued in any other court than the stannaries court (*l*). However, since that year, they may, as regards all the same matters (not being matters of equitable jurisdiction) (*m*), be sued either in the stannaries court or in the county court of their district (*n*); and as regards causes of action arising outside the stannaries, they might always be sued in the stannaries court or elsewhere (*o*).

As regards appeals from the court, these were formerly to the lord warden (assisted by two or more legal assessors); and there was a final appeal to the judicial committee of the privy council (*p*); but under the Judicature Acts, the jurisdiction and powers of the court of the lord warden assisted by his assessors, or of the lord warden sitting in his capacity of judge, have been now transferred to and vested in the Court of Appeal of the Supreme Court of Judicature (*q*).

(*k*) 6 & 7 Will. 4, c. 106; 2 & 3 Vict. c. 58; 11 & 12 Vict. c. 83; 18 & 19 Vict. c. 32; and especially the Stannaries Act, 1869 (32 & 33 Vict. c. 19), and the Stannaries Act, 1887 (50 & 51 Vict. c. 43); and see Carew's History of Cornwall; Doderidge's History of Cornwall, p. 94; Bainbridge on Mines, 4th ed., by Brown, pp. 146—160, 175—187, 194—199; Rowe *v.* Brenton, 8 B. & C. 737; and Harvey *v.* Gilbard, 1 W. W. & H. 552.

(*l*) 4 Inst. 231; Com. Dig. Courts, L. 1.

(*m*) 51 & 52 Vict. c. 43, s. 177.

(*n*) Newton *v.* Nancarrow, 15 Q. B. 144.

(*o*) 4 Inst. 231.

(*p*) See 18 & 19 Vict. c. 32, s. 26.

(*q*) 36 & 37 Vict. c. 66, s. 18.

VIII. *The Courts of the Universities of Oxford and Cambridge.*—These are courts subsisting under antient charters granted to these universities and confirmed by Act of Parliament; and they have an exclusive jurisdiction, *inter alia*, in actions of a civil nature in which any member or servant of the university is a party,—in every case at least where the cause of action arises within the liberties of the university, and the member or servant was resident in the university when it arose (*r*). Which [privilege of exclusive civil jurisdiction was granted, that the students might not be distracted from their studies, by legal process from distant courts and other forensic avocations; and the like privilege appears to have been antiently granted also to all the universities of Europe, in pursuance of a constitution of the Emperor Frederick, A.D. 1158 (*s*). The most antient charter containing this grant to the university of Oxford, was 28 Hen. III. A.D. 1244; and the privileges thereby granted were confirmed and enlarged by almost every succeeding prince, down to King Henry the eighth; in the fourteenth year of whose reign, the largest and most extensive charter of all was granted; and this last-mentioned charter is the charter now governing the privileges of that university; and a charter, somewhat similar to that of Oxford, was afterwards granted to Cambridge, in the third year of Queen Elizabeth; and subsequently was passed the statute of 13 Eliz. c. 29, whereby the legislature recognized and confirmed *all* the charters of these two universities, and those of the 14 Hen. VIII. (for Oxford) and 3 Eliz. (for Cambridge) by name (*t*),—which *blessed Act*, as Sir Edward Coke entitles it (*u*), fully established the civil privileges of these universities.] It is to be observed,

(*r*) 4 Inst. 227; Browne *v.* Renouard, 12 East, 12; Thornton *v.* Ford, 15 East, 634; Turner *v.* Bates, 10 Q. B. 292.

(*s*) 3 Bl. Com. 84.

(*t*) 13 Eliz. c. 29; Ginnett *v.* Whittingham, 16 Q. B. D. 761 (Oxford); and Browne *v.* Renouard, 12 East, 12 (Cambridge).

(*u*) 4 Inst. 227.

however, that the privilege can be claimed only on behalf of members who are defendants; and when an action in the High Court is brought against such member, the university enters a *claim of conusance*, that is, claims the cognizance of the matter; whereupon the action is withdrawn from the High Court and transferred to the university court (*x*); but as regards the university of Cambridge, the privilege is, *semble*, no longer exclusive (*y*). The procedure in the university courts is, for the most part, regulated according to the laws of the civilians, but is subject to any specific rules made by the vice-chancellor with the approval of three of her Majesty's judges; and as regards appeals, the procedure thereon is like that on appeals from other inferior courts, the appeal being to a Divisional Court of the High Court of Justice (*z*).

IX. *The Ecclesiastical Courts.* — Besides the several courts which we have now considered,—and all of which have a civil jurisdiction,—there are other courts which redress only injuries of an *ecclesiastical* nature, and which are properly distinguished by the title of Ecclesiastical Courts. These courts are of the class called inferior courts, but with a very special jurisdiction; and regarding all of them, we will in the first place remark, [that they are eccentrical tribunals, and are principally guided by the rules of the imperial and canon laws; which last-mentioned laws are admitted in England not by any right of their own, but upon bare sufferance and toleration from the municipal law; wherefore, also, these courts must have recourse to the municipal law, to be informed how far their

(*x*) Ginnett *v.* Whittingham, sup.

(*y*) 19 & 20 Vict. c. xvii., s. 18.

(*z*) See (as to Oxford) 25 & 26 Vict. c. 26, s. 12; and Rules of March 21, 1892; and Order in Council of 23rd August, 1894. See also (as to both Universities) 57 & 58 Vict. c. 16, s. 1, sub-s. 5; and (as to Cambridge) the 57 & 58 Vict. c. lx. (the Cambridge University and Corporation Act, 1894).

[jurisdiction extends; and except where and so far as their jurisdiction is recognised by the municipal law, these courts have no jurisdiction; and it matters not what the Pandects of Justinian or the Decretals of Gregory have ordained; which are of no more intrinsic authority in England than the laws of Solon or of Lycurgus. The law of England is the one uniform rule to determine the jurisdiction of our courts;] and if any ecclesiastical or other inferior tribunal whatever attempts to exceed the limits so prescribed them, the High Court of Justice may, and does, prohibit them (*a*), and in some cases punishes their judges (*b*); and with this general caution, we proceed now to consider the various ecclesiastical courts.

[Before proceeding, however, to consider any particular courts, it should be premised in general, that in the time of our Saxon ancestors there was no sort of distinction between the lay and the ecclesiastical jurisdictions: for the sheriff's county court was originally as much a spiritual as a temporal tribunal,—the rights of the Church being ascertained and asserted at the same time, and by the same judges, as the rights of the laity; for which purpose the bishop of the diocese, and the alderman (or, in his absence, the sheriff) of the county, used to sit together in the county court, and had there the cognizance of all causes, as well ecclesiastical as civil,—a superior deference merely being paid to the bishop's opinion in spiritual matters, and to that of the lay judges in temporal (*c*). But so moderate and rational a plan was not continued; for it was (or became) an established maxim in the court of Rome, that all ecclesiastical persons, and all ecclesiastical causes, should be solely and entirely subject to ecclesi-

(*a*) Ex parte Tucker, 1 Man. & Gr. 519; Tucker *v.* Inman, 4 Man. & Gr. 1049; Martin *v.* Mackonochie, 3 Q. B. D. 730; 4 Q. B. D. 697; Rules of the Supreme Court, Ord. lxviii. rr. 2, 3.

(*b*) Hale, Hist. C. L. c. 2.

(*c*) "*Celeberrimo huic conventui episcopus et aldermannus intersunto; quorum alter jura divina, alter humana populum edoceto.*"—Wilk. Leg. Angl.-Sax. LL. Eadg. c. 5.

[astical jurisdiction,—a jurisdiction which was supposed to have been lodged in the Pope, by divine indefeasible right and investiture from our Saviour himself, and to have devolved or been derived from him and through him upon the inferior tribunals (*d*). And soon after the Norman conquest, this doctrine was received in England, William the Conqueror (whose title was warmly espoused by the monasteries, which he had liberally endowed, and by the foreign clergy, whom he had brought over in shoals, and planted in the best preferments of the English Church) being prevailed upon to accept it, and to separate the ecclesiastical court from the civil; after which the county court of the sheriff appears to have fallen into disregard, by the bishop's withdrawing his presence in obedience to the charter of the Conqueror, which prohibited any spiritual cause from being tried in the secular courts, and commanded the suitors to appear before the bishop only, whose decisions were directed to conform to the canon law (*e*).

King Henry the first, on his accession, restored the union of the civil and ecclesiastical courts, reverting in this respect to the antient law of England (*f*); but the restoration was ill-relished by the popish clergy, who, under the guidance of Archbishop Anselm, disapproved of a measure which put them on a level with the laity, and subjected spiritual men and causes to the inspection of the secular magistrates; and therefore, in their synod at Westmin-

(*d*) "Hence the canon lays it "down as a rule, that '*sacerdotes a* "*regibus honorandi sunt, non judi-* "*candi*' (Decret. part 2, caus. 11, "qu. 1, c. 41); and places an em- "phatical reliance on a fabulous "tale which it tells of the Emperor "Constantine; that when some "petitions were brought to him, "imploring the aid of his autho- "rity against certain of his bishops "accused of oppression and injus- "tice, he caused (says the holy "canon) the petitions to be burnt "in their presence, dismissing them "with this valediction: '*Ite et inter* "*vos causas vestras discutite, quia* "*dignum non est ut nos judicemus* "*Deos.*'" (3 Bl. Com. p. 62.)

(*e*) Hale, Hist. C. L. 102; Selden in Eadm. p. 6, l. 24; 4 Inst. 259; Wilk. Leg. Angl.-Sax. 292.

(*f*) 2 Inst. 70.

[ster, in the third year of Henry the first, they ordained that no bishop should attend the discussion of temporal causes; and the effect of this ordinance was speedily to dissolve the newly-effected union. And when, upon the death of King Henry the first, the usurper Stephen was brought in and supported by the clergy, we find one article of the oath which they imposed upon him was, that ecclesiastical persons and ecclesiastical causes should be subject only to the bishop's jurisdiction (*g*). And as it was about that time that the contest and emulation began between the laws of England and those of Rome, the temporal courts adhering to the former, and the spiritual adopting the latter as their rule of proceeding,—this widened the breach between them, and made a coalition afterwards impracticable, which probably would else have been effected at the general reformation of the Church.] And such was the origin of the ecclesiastical courts as separate and independent tribunals.

The jurisdiction which the ecclesiastical courts,—and which were otherwise called spiritual courts or courts christian (*curiæ christianitatis*),—assumed to exercise, was the administration of justice in all ecclesiastical matters in any way connected with the Church. In most of these matters, the connection was a proper and obvious one; but there were others in which the connection was, or at all events became in course of time, less obvious, *e.g.*, those matters which are now commonly designated *testamentary* and *matrimonial;* and ultimately, in the year 1857, by the Acts of 20 & 21 Vict. cc. 77 and 85, the jurisdiction of the ecclesiastical courts in matters testamentary and matrimonial, after an exercise of more than seven centuries, was taken away from the spiritual courts and vested in a modern and secular tribunal called the Court of Probate and the Court for Matrimonial Causes.

The particular ecclesiastical courts which have remained,

(*g*) Spelm. Cod. 310.

and retained their jurisdiction, are the following:—(1.) the Court of the Archdeacon; (2.) the Court of the Bishop, otherwise called the Consistory Court; (3.) the Provincial Court of the Archbishop, which in the province of York was called the Chancery Court of York, and in the province of Canterbury the Court of Arches; and (4.) the Court of Appeal; and we shall proceed to consider each of these courts in the order in which they have been just enumerated (*h*).

1. The Court of the Archdeacon holds the lowest place in the whole ecclesiastical polity. It is held, in each archdeaconry, before a judge appointed by the archdeacon himself, and called his Official. Its jurisdiction comprises all ecclesiastical causes arising within the archdeaconry; and, as a general rule, the litigant may commence his suit either in this court or in that of the bishop; though in some archdeaconries the suit must be commenced in the former, to the exclusion of the latter (*i*). From the archdeacon's court an appeal generally lies to that of the bishop, by virtue of the statute 24 Hen. VIII. c. 12.

2. The Consistory, that is, the Bishop's Court, is held in the several cathedrals, for the trial of all ecclesiastical causes arising within the diocese; and to this Court have been specially assigned all proceedings instituted against clerks for immorality and the like under the Clergy Discipline Act, 1892, to be presently mentioned. The chancellor of the diocese (or his commissary) is the judge; and from his sentence an appeal lies, by virtue of the same

(*h*) Prior to the year 1857, there existed also another ecclesiastical tribunal, viz. the *Prerogative Court;* which was, in each province, held before a judge appointed by the archbishop thereof, for administering justice in testamentary matters (viz. those relating to probate and administration), and in those only; and the jurisdiction of this Court arose in the case of the deceased leaving *bona notabilia* in different dioceses; in which case, the matter could not be disposed of in any single diocese; and the archbishop accordingly claimed the jurisdiction by way of special *prerogative*. (Vide sup. vol. II. p. 199.)

(*i*) Woodward *v.* Fox, 2 Vent. 267; Godolph. 61.

statute of Henry the eighth, to the Provincial Court of the Archbishop; but as regards proceedings under the Clergy Discipline Act, 1892, the appeal is (at the option of the appellant) either to the Provincial Court, or to the Privy Council,—the appeal being on questions of *law* only.

3. The Provincial Court of the Archbishop.—This court (as we have already indicated) is called in the province of York the Chancery Court of York, and in the province of Canterbury the Court of Arches. The judge of the Chancery Court of York is merely styled the Principal Official or Auditor; but the judge of the Court of Arches is called the *Dean of the Arches*, because he antiently held his court in the church of St. Mary-*le-bow* (*Sancta Maria de arcubus*). And the office of Dean of the Arches having been for a long time united with that of the archbishop's principal official, he now, in right of the last-mentioned office (as doth also the principal official of the Archbishop of York), receives and determines appeals from the sentences of all inferior ecclesiastical courts within the province. The proper jurisdiction of the Provincial Court is appellate; but *original* suits are also brought therein, the cognizance of which properly belongs to inferior jurisdictions within the province, but in respect of which the inferior judge has waived his jurisdiction, under a certain form of proceeding known in the canon law by the denomination of *letters of request* (*k*). And it is to be observed, that, under the Church Discipline Act, 1840 (3 & 4 Vict. c. 86), no criminal proceeding against a clerk in holy orders for an ecclesiastical offence could be brought in any ecclesiastical court otherwise than by letters of request from the bishop to the Dean of the Arches,—a provision which in such cases took away the jurisdiction of the inferior ecclesiastical courts (*l*); but now by the Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), as regards all

(*k*) Burgoyne *v.* Free, 2 Add. 406; Ex parte Denison, 4 Ell. & Bl. 292.

(*l*) Sheppard *v.* Bennett, Law Rep., 2 Adm. & Eccl. Ca. 335.

proceedings under that Act (being proceedings touching the moral behaviour of the clergy, as distinguished from matters of doctrine or of worship), the Church Discipline Act, 1840, has been for the most part repealed; and the proceeding is now to be taken in the Consistory Court of the bishop.

Of the Court of Arches, there is a branch termed the Court of Peculiars, having jurisdiction over all those parishes dispersed through the province of Canterbury in the midst of other dioceses, which are exempt from the Ordinary's jurisdiction and subject to the Metropolitan only; and all ecclesiastical causes, arising within these peculiar or exempt jurisdictions, are originally cognizable by this court, save only questions of residence and as to pluralities (*m*).

The two Provincial Courts are now united, and have been arranged on a new basis. For by the Public Worship Regulation Act, 1874 (*n*), it has been provided, that the two archbishops may (subject to the approval of the Crown) appoint "a judge of the Provincial Courts of Canterbury and York;" who, as a vacancy arises in the office of official principal of Canterbury, or of official principal or auditor of York, shall, *ex officio*, fill such office also; and all proceedings thereafter taken before him shall be deemed to be taken in the Arches Court of Canterbury or the Chancery Court of York, as the case may require; and whenever a vacancy shall arise in the office of master of the faculties to the Archbishop of Canterbury, such judge shall also become *ex officio* master of the faculties; so that (in effect) one supreme tribunal shall (or eventually shall) exercise all the ecclesiastical functions of these various officials, in a consistent and uniform way (*o*).

4. The Court of Appeal.—This is the Judicial Com-

(*m*) 1 & 2 Vict. c. 106, s. 108; 48 & 49 Vict. c. 55.

(*n*) 37 & 38 Vict. c. 85.

(*o*) Rules for the procedure of the united provincial court with regard to proceedings taken under this Act, were issued in February, 1879.

mittee of the Privy Council (*p*), instead of as formerly the Court of Delegates. And here it seems desirable to mention, that the Court of Delegates,—*judices delegati*,—were appointed by a commission issuing out of Chancery, to represent the royal person and to hear appeals in ecclesiastical causes (*q*). These commissioners, in ordinary cases, consisted of three puisne judges, (one from each of the superior common law courts,) together with three or more civilians (*r*); and the commission was held under the statute 25 Hen. VIII. c. 19, which authorized all manner of appeals to be had and prosecuted from the archbishops' courts to the sovereign in Chancery—the appeal prior to that statute having been to the Pope; and the decision of the Court of Delegates was final, although in extraordinary cases a commission of *review* would have been granted (*s*). [Appeals to Rome, we may here observe, were always, even in the times of popery, looked upon by the English nation with suspicion, being deemed contrary to the liberty of the subject, to the honour of the Crown, and to the independence of the whole realm; and they had, in fact, been first introduced, in very turbulent times, in the sixteenth year of King Stephen (A.D. 1151), at the same period when (as Sir Henry Spelman observes) the civil and canon laws were first imported into England. Accordingly, in a few years after, to obviate the practice, the Constitutions made at Clarendon in the eleventh year of Henry the second, on account of the disturbances raised by Archbishop Becket and his abettors, expressly declared, that appeals in causes ecclesiastical ought to lie from the archdeacon to the diocesan; from the diocesan to the archbishop of the province; and from the archbishop to the

(*p*) See 2 & 3 Will. 4, c. 92; 3 & 4 Will. 4, c. 41, s. 3; 6 & 7 Vict. c. 38; 7 & 8 Vict. c. 69, ss. 9, 12; Gorham *v.* Bishop of Exeter, 15 Q. B. 52; 37 & 38 Vict. c. 85, s. 9.

(*q*) 3 Bl. Com. 66.

(*r*) Special Report on Ecclesiastical Courts, dated 25th January, 1831.

(*s*) 26 Hen. 8, c. 1; 1 Eliz. c. 1; 3 Bl. Com. 67.

[king; and were not to proceed any further without special licence from the Crown (*t*). But in the reigns of King John and his son Henry the third, the custom of appealing to Rome in causes ecclesiastical was re-introduced, and was never thoroughly broken off till the reign of Henry the eighth; when all the jurisdiction of the Pope in matters ecclesiastical was restored to the Crown, to which it had originally belonged, the statute of 25 Hen. VIII. having been, in this particular, but declaratory of the antient law of the realm (*u*).] And the ultimate appeal thus restored to the king was exercised by him through this Court of Delegates constituted by such commission as aforesaid. Subsequently, by the 2 & 3 Will. IV. c. 92, every person who might formerly have appealed to the Court of Delegates was required for the future to bring his appeal to his Majesty in council instead; and by the 3 & 4 Will. IV. c. 41, s. 3, 6 & 7 Vict. c. 38, s. 11, and 7 & 8 Vict. c. 69, s. 9, it is provided, that her Majesty may direct all appeals from ecclesiastical courts to be referred for decision to the *Judicial Committee* of the Privy Council (*x*); and by the 39 & 40 Vict. c. 59, (The Appellate Jurisdiction Act, 1876,) s. 14, provision is made (as noticed hereafter more fully) for the appointment of certain of the archbishops and bishops to attend as assessors of the Judicial Committee on the hearing of such appeals (*y*).

(*t*) Cod. Vet. Leg. 315.

(*u*) 4 Inst. 341.

(*x*) As to this committee, vide sup. vol. II. p. 453.

(*y*) No notice has been taken in the text, of such courts as have only a *voluntary* as distinguished from a *contentious* jurisdiction; nor of "the court of *high commission*," regarding which Blackstone (vol. iii. p. 68) says, "This court "was erected and united to the "regal power by virtue of the "statute 1 Eliz. c. 1, instead of a "larger jurisdiction which had "before been exercised under the "Pope's authority. It was in-"tended to vindicate the dignity "and peace of the Church, by "reforming, ordering, and col-"lecting the ecclesiastical state "and persons; and all manner of "errors, heresies, schisms, abuses, "offences, contempts, and enor-"mities. Under the shelter of "which very general words, means "were found, in that and the two "succeeding reigns, to vest in the

We now proceed to consider the wrongs or injuries of a pecuniary character that are cognizable in the different ecclesiastical courts, it not being our intention in this place to take any specific notice of proceedings *pro salute animæ* (*z*). And these wrongs or injuries consist principally in (1) the subtraction of tithes; (2) the non-payment of ecclesiastical dues; (3) the spoliation of benefices; and (4) dilapidations, and the like.

[(1.) The *subtraction*, or withholding, *of tithes* from the rector or the vicar, whether the former be a clergyman or a lay appropriator (*a*). But herein a distinction must be taken; for the ecclesiastical courts have no jurisdiction to try the *right* to tithes, unless between spiritual persons (*b*);

"high commissioners extraordi- "nary and almost despotic powers "of fining and imprisoning; which "they exerted much beyond the "degree of the offence itself, and "frequently over offences by no "means of spiritual cognizance. "For which reasons this court was "justly abolished by the statute 16 "Car. 1, c. 11."

(*z*) The offences proceeded against *pro salute animæ*, are described in the Report of the Commissioners on the ecclesiastical courts, dated 15th July, 1832, as being (1) those "committed by the clergy them- "selves, such as neglect of duty, "immoral conduct, advancing doc- "trines not conformable to the "Articles of the Church, suffer- "ing dilapidations, and the like "offences"; and (2) those "com- "mitted by laymen, such as "brawling, laying violent hands "and other irreverent conduct in "the church or churchyard, vio- "lating churchyards, neglecting "to repair ecclesiastical buildings, "incest, incontinence." . . . . "These offences" (the Report goes on to state), "are punished by "monition, penance, excommuni- "cation, suspension *ab ingressu* "*ecclesiæ*, suspension from office, "and deprivation;" and these offences (as already indicated) are now,—when it is a matter of doctrine or of worship, proceeded against under the Church Discipline Act, 1840; and when it is a matter of morality, are proceeded against under the Clergy Discipline Act, 1892. The ecclesiastical courts formerly entertained also suits for *defamation*, where the spiritual offence of incontinency was wrongfully imputed; but by 18 & 19 Vict. c. 41, their jurisdiction in this matter was abolished; and their jurisdiction in "brawling," against persons not in holy orders, was taken away by 23 & 24 Vict. c. 32, s. 1.

(*a*) Stat. 32 Hen. 8, c. 7.

(*b*) 2 Roll. Abr. 309, 310; Bro. Abr. tit. Jurisdiction, 85.

[but in ordinary cases, between spiritual men and lay men, are only to compel the payment of them, when the right is not disputed (*c*). By the statute of *Circumspectè agatis* (13 Edw. I.), it is declared that the court christian shall not be prohibited from holding plea, "*si rector petat versus parochianos oblationes et decimas debitas et consuetas*" (*d*): so that if any dispute arises whether such tithes be *due* and *accustomed*, this cannot be determined in the ecclesiastical court, as such questions affect the temporal inheritance, and the determination must bind the real property. But where the *right* does not come into question, but only the *fact* whether or no the tithes allowed to be due are really subtracted or withdrawn, this is a transient personal injury for which the remedy (viz. the recovery of the tithes, or their equivalent) may properly be had in the spiritual court. However, in modern times, it hath seldom happened that tithes are sued for in the spiritual court; for if the defendant pleads any custom, *modus*, composition, or other matter whereby the right of tithing is called into question, this takes it out of the jurisdiction of the ecclesiastical judge; for the law will not suffer the existence of such a right to be decided by the sentence of any single—much less an ecclesiastical—judge, without the verdict of a jury.] Moreover, a summary method of recovering tithes not exceeding the value of 10*l.* (or, where due from Quakers, 50*l.*), was given by the statute 53 Geo. III. c. 127, by complaint to two justices of the peace; and by 5 & 6 Will. IV. c. 74, and 4 & 5 Vict. c. 36, this proceeding before justices was made the *only* remedy to recover tithes not exceeding the above value, (no suit being allowed either in the civil or in the ecclesiastical courts,)

(*c*) 2 Inst. 364, 389, 490.

(*d*) Blackstone (vol. iii. p. 88) says that the 13 Edw. 1 is rather a *writ* than a statute, and cites Barrington, 120; 3 Pryn. Rec. 336. It may be remarked, that in Ruffhead's edition of the Statutes at Large it is stated, that the above proviso (though inserted in his text) is not in the original of the statute of *Circumspectè agatis*.

unless the title to the tithes was *bonâ fide* brought into question, in which case an action would lie in the temporal courts as before those statutes (*e*). Besides all which it is to be recollected that the claim itself to tithes has now become of rare occurrence—this species of property having been, in almost every parish, now commuted into a corn rent-charge under the Tithe Commutation Acts; and for the recovery of tithes when in arrear, a special mode of proceeding by way of distress and otherwise, or now by action, has been provided (*f*).

[(2.) The second injury cognizable in the spiritual courts, is the *non-payment of ecclesiastical dues* to the clergy, such as pensions, mortuaries, compositions, offerings, and whatsoever falls under the denomination of *surplice-fees*, for ministerial offices of the Church,—all which injuries are redressed by a decree for their payment. But the provisions of the Tithe Commutation Acts with regard to the recovery of *tithes*, extend also to oblations and all other ecclesiastical dues and demands whatsoever (*g*).

(3.) The *spoliation* of benefices.—Spoliation is an injury done by one clerk or incumbent to another, in taking the fruits of his benefice without any right thereunto, but under a pretended title; which injury is remedied by a decree to account for the profits so taken; and when the *jus patronatûs* (or right of advowson) doth not itself come into debate, this injury is cognizable in the spiritual court. For example, if a patron first presents A. to a benefice, who is instituted and inducted thereto: and then, upon pretence of a vacancy, *the same* patron presents B. to the same living, and he also obtains institution and induction; here, if the fact of the vacancy be disputed, then that clerk who is kept out of the profits of the living, whichever it be, may sue the other in the spiritual court for

(*e*) Peyton *v.* Watson, 3 Q. B. 658; Robinson *v.* Purday, 16 Mee. & W. 11.

(*f*) Vide sup. vol. II. p. 726.

(*g*) Vide sup. vol. II. p. 734.

[spoliation, or taking the profits of his benefice; and it shall there be tried whether the living were, or were not vacant; upon which the validity of the second clerk's pretensions must depend (*h*). But if the right of patronage itself comes at all into dispute, as, *e. g.*, if one patron presented A. and another patron presented B., there the ecclesiastical court hath no cognizance, (provided the profits sued for amount to a fourth part of the value of the living,) but may be prohibited, at the instance of either patron, by the writ of *indicavit* (*i*). So, also, if a clerk, without any colour of title, ejects another from his parsonage, this injury must be redressed in the temporal courts; for it depends upon no question determinable by the spiritual law, (as plurality of benefices or no plurality, vacancy or no vacancy,) but is merely a civil injury.

(4.) Another case in which these courts have jurisdiction, is that of *dilapidations*, which (as elsewhere explained) are a kind of ecclesiastical waste (*k*). Such dilapidations may be either voluntary, by pulling down; or permissive, by suffering the chancel, parsonage-house, and other buildings thereunto belonging, to decay (*l*); and here an action lies either in the spiritual or in the temporal court (*m*); and it may be brought by the successor against the predecessor if living, or if dead, then against his legal personal representatives.]

The spiritual courts have also cognizance as to *neglect in repairing the church, churchyard, and the like* (*n*); and until recently, proceedings might, under certain circumstances, have been brought therein for *nonpayment of a church-*

(*h*) F. N. B. 36.

(*i*) See 13 Edw. 1 (*Circ. agat.*); Artic. Cleri, 9 Edw. 2, st. 1, c. 2; F. N. B. 45.

(*k*) Vide sup. vol. II. p. 709.

(*l*) See also 13 Eliz. c. 10, as to a spiritual person making over his goods with intent to defeat his successor of his remedy for dilapidations.

(*m*) Jones *v.* Hill, Cart. 224; S. C., 3 Lev. 268.

(*n*) Circumspectè agatis, 5 Rep. 66; and see the Report of Commissioners on Ecclesiastical Courts, dated 15th Feb. 1832, p. 51.

rate (*o*); but by 53 Geo. III. c. 127, 5 & 6 Will. IV. c. 74, and 4 & 5 Vict. c. 36, where the rate was not disputed, and the amount demanded did not exceed 10*l.*—or in the case of Quakers, 50*l.*,—the remedy was before the justices of the peace (*p*); and now, by 31 & 32 Vict. c. 109, s. 1 (as explained in a former place), no suit or proceeding to compel the payment of a church-rate can be brought in any ecclesiastical or other court, or before any justice or magistrate (*q*). Again, the spiritual courts have jurisdiction in all suits respecting *pews and seats* in the body of the church (*r*); but where a pew is claimed by prescription, and the right is disputed, the temporal court will, by writ of prohibition, prevent the ecclesiastical court from proceeding farther; and this, in order that the claim by prescription may be determined by a jury, or at least by the rules of the common law.

Having now indicated the principal injuries for which a remedy is provided in the ecclesiastical courts, it may not be improper to add a short account of the *method of proceeding* in these courts; all which proceedings, as regards their general character, are regulated according to the principles and practice of the civil and canon laws, or according to a mixture thereof, corrected and new modelled by their own particular usages, and by the interposition of the temporal courts (*s*); but it is to be remembered that, although proceedings in the spiritual court be ever so regularly consonant to the rules of the civil laws, yet if they be manifestly repugnant to the fundamental maxims of the municipal law, (as if they require two witnesses to prove a fact, where one will

(*o*) 3 Bl. Com. p. 92.

(*p*) Ex parte Mannering, 2 B. & Smith, 431; Pease *v.* Naylor, 3 B. & Smith, 620.

(*q*) Vide sup. vol. II. p. 695.

(*r*) Mainwaring *v.* Giles, 5 Barn. & Ald. 361; Parker *v.* Leach, Law Rep., 1 P. C. 312.

(*s*) As to the proceedings in the Consistory Court *of London*, see Rules and Regulations issued in 1877, Law Rep., 2 P. D. *ad finem*.

suffice in a temporal court,) in such cases a prohibition will be awarded against them (*t*). The details of the procedure in the spiritual court are as follows :—

[The ordinary course of the procedure is first,—by *citation*, to call the party injuring before them ; and then, by *libel* (*libellus*, a little book), or by articles drawn out in a formal *allegation*, to set forth the complainant's ground of complaint (*u*). To this succeeds the *defendant's answer* upon oath ; when, if he denies or extenuates the charge, the plaintiff proceeds to *proofs* (*x*). If the defendant has any circumstances to offer in his defence, he must also propound them in what is called his *defensive allegation*, to which he is entitled in his turn to the *plaintiff's answer* upon oath, and may from thence proceed to *proofs* as well as his antagonist (*y*).] And by 14 & 15 Vict. c. 99, s. 2, and 17 & 18 Vict. c. 47, the court may summon witnesses, and examine them, or cause them to be examined, by word of mouth ; and that either before or after exami-

(*t*) 2 Roll. Abr. 300, 302; Tucker *v.* Inman, 4 Man. & Gr. 1049; Martin *v.* Mackonochie, 3 Q. B. D. 730 ; 4 Q. B. D. 697.

(*u*) 3 & 4 Vict. c. 86, ss. 7, 8; and "Rules and Regulations, 1867."

(*x*) In former times, when a clergyman was cited to appear before the bishop or ecclesiastical court for alleged misconduct, he might be required to make answer to it, on the oath of himself and his *compurgators;* which latter persons were certain of his neighbours able to swear that they believed him innocent of the charge. This oath, *ex officio* (as it was called), was prohibited generally to laymen (12 Rep. 26); but was continued, as regarded the clergy, till the middle of the seventeenth century, when it was abolished by 13 Car. 2, st. 1, c. 12. (Report of Commissioners on Ecclesiastical Courts, 15 Feb. 1832, p. 55.)

(*y*) 3 Bl. Com. p. 100. In Brice's Law relating to Public Worship (chap. iv.), it is pointed out, that there is a difference in the proceedings, according as the suit is civil or criminal. In a civil suit, they are said to commence with a *citation*, by *decree*, by *monition*, or by *act on petition ;* and then comes the *libel*, the *litis contestatio*, and the *pleas* and *answers*. In criminal suits, the first plea is termed the *articles*, nominally brought under the sanction and in the name of some bishop, whose "*office*" is thus said "*to be promoted ;*" and the articles must not be inconsistent with or beyond the citation.

nation by deposition or affidavit (*z*); and notes of such evidence shall be taken down in writing by the judge, or registrar, or such other person and in such manner as the judge shall direct. [When all the pleadings and proofs are concluded, they are referred to the consideration of the judge, who *takes information* by hearing advocates on both sides, and thereupon forms his *interlocutory decree* or *definite sentence* at his own discretion.]

The ecclesiastical courts have power to pronounce, among other sentences, that of *suspension* (*a*), and even *deprivation* (in the case of suits against beneficed incumbents) (*b*); and also sentence of *excommunication*, for offences falling under ecclesiastical cognizance. And as regards the sentence of excommunication, that is described in the books as being of two kinds,—the less and the greater,—[the lesser excommunication excluding the party from the participation of the sacraments, the greater proceeding farther, and excluding him not only from these, but also from the company of all Christians (*c*). Formerly, too, and until the passing of the Act to be presently mentioned, an excommunicated man was disabled to do any act that was required to be done by a *probus et legalis homo; e.g.*, he could not serve upon juries, or be a witness in any court, or bring an action, either real or personal, to recover lands or money due to him.] In this state of things, it was the practice of the ecclesiastical courts to avail themselves of the weapon of excommunication, in order to enforce their sentences and orders in general; for where any of these were disobeyed, the court excommunicated the disobedient party; by which not only did he become

(*z*) 3 & 4 Vict. c. 86, s. 17; Bishop of Norwich *v.* Pearse, Law Rep., 2 Adm. & Eccl. Ca. 281.

(*a*) Suspension may be either *ab officio* merely, or *ab officio et beneficio* (Brice's Public Worship, p. 280).

(*b*) Martin *v.* Mackonochie (No. 1), 3 Q. B. D. 730; 4 Q. B. D. 697; 6 App. Ca. 424; Benwell *v.* Bishop of London, 14 Moore, P. C. 395; Dean *v.* Green, 8 P. D. 79; Martin *v.* Mackonochie (No. 2), 6 P. D. 57; 7 P. D. 94; and 8 P. D. 191.

(*c*) 3 Bl. Com. 101.

subject to the consequences above described, but the general law of England stepped in besides to the court's assistance,—permitting the bishop to certify the contempt to the sovereign in Chancery, who issued thereon a writ, called, from the bishop's certificate, a *significavit*, or, from its effects, a writ *de excommunicato capiendo*, to the sheriff of the county,—under which he was to take the offender and imprison him in the county gaol until he was reconciled to the Church. But by 53 Geo. III. c. 127, it was provided, that no excommunicated person should incur by the sentence any penalty or incapacity whatever, save such imprisonment, not exceeding six months, as the ecclesiastical court should direct; and that such sentence, unless and until it was signified to the sovereign in Chancery, should not be enforced by writ *de excommunicato capiendo;* and by the same Act, excommunication, as *for contempt*, was in effect abolished; and in lieu thereof, it has been provided, that, where a lawful citation or sentence has not been obeyed, or where a contempt in face of the court has been committed, the judge shall have power to pronounce such persons "contumacious and in contempt;" and, after a certain period, to signify the same to the sovereign in Chancery: whereupon a writ *de contumace capiendo* shall issue (*d*); which shall have the same force and effect as formerly belonged, in case of contempt, to a writ *de excommunicato capiendo*.

X. *The Court of Chivalry, and Courts-Martial.*—There was antiently a court military called the court of chivalry, held before the lord high constable and the earl marshal of England; and which court was of an eccentrical character,—foreign to the general or common law. And although this court was not a court of record, yet it had a

(*d*) R. *v.* Rickets, 6 A. & E. 537; R. *v.* Baines, 12 Ad. & E. 210; Adam *v.* Colthurst, Law Rep., 2 Adm. & Eccl. Ca. p. 40; Dean *v.* Green, 8 P. D. 79; Ex parte Green, 7 Q. B. D. 273; Green *v.* Ld. Penzance, 6 App. Ca. 657.

jurisdiction criminal as well as civil,—relating to deeds of arms and of war; and to the redressing of injuries of honour, and encroachments in matters of coat-armour, precedency, and other distinctions of families. As a court of honour, the Court gave satisfaction where no other remedy was available, by ordering reparation in point of honour; and for that purpose, it would, *e.g.*, compel the defendant to take the lie upon himself, or to make such other submission as the law of honour required; but the Court did not award pecuniary satisfaction or damages. The Court adjusted also questions concerning the right to armorial ensigns, bearings, crests, supporters, pennons, and the like; and it determined all rights of place and precedence, subject to any royal patent or Act of Parliament. But latterly the marshalling of coat armour, which was formerly the pride and study of all the best families in the kingdom, fell into the hands of certain officers called heralds; whose testimony as to descent (it may be observed incidentally) is no longer of the same weight as it once was; nor is such testimony even admissible, as a general rule, as evidence in courts of justice; but the original visitation books of the Heralds' Office, compiled at a time when progresses were solemnly and regularly made into every part of the kingdom, to inquire into the state of families, and to register such marriages and descents as were verified to the heralds upon oath, are still allowed to be good evidence of pedigree (*e*). The method of commencing proceedings in the Court of Chivalry,—as regarded all that portion of the jurisdiction which it continued to exercise,—was by petition; and the trial was either by witnesses or by combat; and an ultimate appeal lay to the sovereign in person (*f*). But the Court has long since ceased to exercise any jurisdiction as a court, *scilicet*, of military or martial law; and,

(*e*) Matthews *v.* Port, Comb. 63; Taylor on Evidence, 2nd ed. 1358.

(*f*) 3 Bl. Com. 68; 4 Bl. Com. 267; 13 Ric. 2, st. 1, c. 2; Com. Dig. *Courts;* Bac. Abr. *Courts;* Parker's case, 1 Lev. 230; Show. Parl. Ca. 60; 4 Inst. 125.

indeed, military or martial law has now no place in the institutions of this country,—unless under the articles of war established under the Army Act, 1881 (44 & 45 Vict. c. 58), and the annual Act which brings into force or continues in force yearly in every year, and for no longer period, the Army Act, 1881; and all offences, cognisable under these articles of war, are tried before the *courts-martial* which are from time to time constituted, as the occasion requires and as is provided for by the Act (*g*). And no appeal lies from the decision of a court-martial; but the matter comes before the Queen personally (or her commander-in-chief of the forces).

(*g*) Vide sup. vol. II. p. 585.

CHAPTER V.

OF THE SUPREME COURT OF JUDICATURE.

OF the inferior courts of justice sufficient has now been said; and it is time to proceed to a consideration of the superior courts of law and equity, and to present the reader with an account of the change which has been effected therein by certain Acts called the Judicature Acts (*a*),—a

(*a*) The Judicature Acts are:—36 & 37 Vict. c. 66 (The Judicature Act, 1873); 37 & 38 Vict. c. 83 (The Judicature Act, 1874); 38 & 39 Vict. c. 77 (The Judicature Act, 1875); 39 & 40 Vict. c. 59 (The Appellate Jurisdiction Act, 1876); 40 & 41 Vict. c. 9 (The Judicature Act, 1877); 41 & 42 Vict. c. 35 (The Judicature Act, 1878); 42 & 43 Vict. c. 78 (The Judicature Act, 1879); 44 & 45 Vict. c. 68 (The Judicature Act, 1881); 46 & 47 Vict. c. 29 (The Judicature Act, 1883); the 47 & 48 Vict. c. 61 (The Judicature Act, 1884); 53 & 54 Vict. c. 44 (The Judicature Act, 1890); 54 & 55 Vict. c. 14 (The Judicature, London Causes, Act, 1891); 54 & 55 Vict. c. 53 (The Judicature Act, 1891); and 57 & 58 Vict. c. 16 (The Judicature Act, 1894). Various orders and rules of practice have from time to time been made, by the "Rule Committee" of the judges, under these Acts, the principal of which (now in force) are those of 1883, of October, 1884, and of December, 1885; but others have since been (and are from time to time being) added to these, *e.g.*, those of July, 1886; of December, 1886; of May, 1887; of December, 1887; of August, 1888; of December, 1889; of June, 1891; of December, 1891; of August, 1892; of August, 1893; of November, 1893; and of October, 1894. There are also the orders as to court fees of January, 1884, and July, 1884; and the rules as to funds in court of December, 1894, with some few orders and rules incidental thereto respectively; besides a great variety of rules under particular statutes. And the multiplicity of these (and of other like) statutory rules having become exceedingly

change consisting principally in this, that all the superior courts theretofore existing are now united in one court, so that justice is now administered in a *single* supreme court, in one or other of the Divisions of which an appropriate remedy for all manner of injuries may be had. But lest a change so great should leave anything temporarily unprovided for, and should thereby occasion any defect in the procedure, it was provided that where no special provision was contained either in the Acts, or in the orders or rules made pursuant thereto, all methods of procedure in use in the former superior courts respectively should be exercised, used, and practised, as nearly as might be, in the new tribunal, in the same manner as previously, in the superior courts (*b*); and at the same time, and with a view to the complete assimilation of the procedure in the Queen's Bench Division and in the Chancery Division respectively of the High Court (which, as we shall presently see, is a branch of the Supreme Court), it became the established practice, that wherever no new procedure was specifically prescribed by the Acts orders and rules, in any case of variance between the old procedure in the two divisions, that procedure which was the more convenient of the two should be adopted (*c*).

From the time then that the above Acts came into operation—that is to say, on the 1st November, 1875—the jurisdictions previously vested in or capable of being exercised by the Court of Chancery, the Court of Queen's Bench, the Court of Common Pleas, the Court of Exche-

embarrassing, the Rules Publication Act, 1893 (56 & 57 Vict. c. 66), has been passed to regulate, or further regulate, the making of such rules, and to provide for their being duly known before they become operative. Also, by 57 & 58 Vict. c. 16, s. 4, the rule-making committee of the judges now includes the President of the Incorporated Law Society, one practising barrister, and one other person appointed by the Lord Chancellor.

(*b*) 36 & 37 Vict. c. 66, s. 23; 38 & 39 Vict. c. 77, s. 21.

(*c*) Ord. (1883) lxxii. r. 2; Newbiggin *v.* Armstrong, 13 Ch. D. 310; Le Grange *v.* McAndrew, 4 Q. B. D. 211.

quer, the Court of Admiralty, the Court of Probate, and the Court for Divorce and Matrimonial Causes, were transferred to and became vested in the High Court of Justice, so as to effect a union and consolidation of those several courts; and the London Court of Bankruptcy has since been added thereto as a division of the High Court (*d*); and all these Courts therefore now constitute (in conjunction with the Court of Appeal, newly established by the Acts) one single supreme tribunal wherein is administered both law and equity: so that if any plaintiff, petitioner or defendant shall advance an *equitable* claim or defence, such relief is given therein as theretofore by the Court of Chancery; and all *legal* claims, demands and liabilities existing by common law, custom, or statute, are recognized and given effect to therein as theretofore by any of the above-mentioned courts (*e*).

But before we treat further of the constitution of this High Court, and the Divisions of which it consists, it will be necessary, in order to explain the alterations effected in our legal system, to give some account of each of the above courts out of which it is composed. And we shall commence with—

I. The Court of Chancery, otherwise called the High Court of Chancery.—This Court, in matters of civil property, was always deemed the most important of any of the superior courts of justice; [and it is said to have taken its name from the judge who presided over it, the Lord Chancellor. The office and name of Chancellor was certainly known to the Courts of the Roman emperors, and originally signified a chief secretary, who was afterwards invested with certain judicial powers, and who exercised a general superintendence over the officers of the prince. From the Roman empire it passed to the Roman Church; and from that church to the dignitaries thereof; hence

(*d*) The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 92—94.

(*e*) 36 & 37 Vict. c. 66, ss. 16, 24.

[every bishop has to this day his chancellor. And when the modern kingdoms of Europe were established upon the ruins of the empire, almost every state preserved its chancellor; and although the chancellor appears to have had different jurisdictions and dignities in the different states, according to their different constitutions,—still, in all of them, he seems to have had the supervision of all charters, letters, and such other public instruments of the crown as were authenticated in the most solemn manner. Therefore, when seals came in use, he had invariably the custody of the great seal. And, in fact, the office of chancellor or lord keeper (for by the statute 5 Eliz. c. 18 the two designations were declared to be exactly the same), is with us at this day created by the mere delivery of the Great Seal into his custody (*f*); and he thereby becomes, without writ or patent, an officer of the greatest weight and power of any now subsisting in the kingdom, and superior, in point of precedency, (if of the peerage,) to every temporal lord (*g*);] and he has a salary of 10,000*l.* per annum (*h*); he [is a privy councillor by his office (*i*); and, according to Lord Chancellor Ellesmere, prolocutor (or speaker) of the House of Lords by prescription (*k*). To him (under the Crown) belongs also the appointment of all justices of the peace throughout the kingdom—a power which (in the case of county magistrates) he usually exercises on the nomination of the lord lieutenant. And from having formerly been usually an ecclesiastic, he became keeper of the king's conscience; visitor, in right of the king, of all hospitals and colleges of royal foundation; and patron of all the king's livings of the value of 20*l.* per annum or under, in the king's books (*l*). And as the

(*f*) Lamb. Archeion, 65; 1 Roll. Abr. 385.

(*g*) Stat. 31 Hen. 8, c. 10, ss. 4, 8.

(*h*) 14 & 15 Vict. c. 82, s. 17; 15 & 16 Vict. c. 87, s. 16; see 36 & 37 Vict. c. 66, s. 13.

(*i*) Selden, Office of Lord Chancellor, sect. 8.

(*k*) Of the Office of Lord Chancellor, edit. 1561.

(*l*) Madox, Hist. of Exchequer, 42; Lord Chancellor's case, Ho-

[representative of the Crown, the *parens patriæ*, he is also the general guardian of all infants, idiots, and lunatics; and has the general superintendence of all charitable uses in the kingdom; appoints to the church livings vested in Roman Catholics; and distributes other offices, dignities, and patronage. He used to exercise, besides, a very large jurisdiction in the Court of Chancery, the principal part of which was concerned with that portion of our law which is called *equity;* although a not inconsiderable portion of the common law also lay within the jurisdiction of the Court (*m*), *e.g.*, in *scire facias* to cancel letters patent, and on petitions of right, traverses of office, and the like.

The distinction between law and equity, and their administration in different courts, is a sensible enough distinction in itself (*n*); and it prevailed also in the Roman law, the *jus prætorium*, or discretion of the prætor, being distinct from the *leges*, or standing laws (*o*); but the

bart, 214; Gibs. 764; 1 Burn's Ecc. Law, 129. It is commonly assumed, that since the new valuation of benefices in the time of Henry the eighth, 20*l.* per annum in the reign of Henry the eighth was equivalent to the twenty marks temp. Edward the third (38 Edw. 3; 3 F. N. B. 35).

(*m*) The Court of Chancery consisted of *two distinct tribunals*, one being a court of equity, and the other a court or office of *common law;* and out of the latter court (as an *officina justitiæ*) issued all original writs passing under the Great Seal, and all commissions of sewers, lunacy, and the like. And here it may be mentioned, that some of these writs were originally kept in a *hamper* (whence the "hanaper office," as to which see 5 & 6 Vict. c. 103), and others in a little sack or bag (whence the "petty bag office," as to which see 12 & 13 Vict. c. 109; 37 & 38 Vict. c. 81, s. 5; and 42 & 43 Vict. c. 78, Sched. I.). And as to the Office of the Crown in Chancery, see 37 & 38 Vict. c. 81 (The Great Seal Offices Act, 1874); 40 & 41 Vict. c. 41 (The Crown Office Act, 1877); 43 & 44 Vict. c. 10 (The Great Seal Act, 1880); 47 & 48 Vict. c. 30 (The Great Seal Act, 1884); and 53 Vict. c. 2 (The Crown Office Act, 1890),—the Office of the Crown in Chancery being wholly distinct from the Crown Office, Q. B. Division, as to which see generally, Chapters XII. and XV., infra.

(*n*) Bacon, De Aug. Scient. lib. viii. ch. 3, app. 45.

(*o*) Thus Cicero: "*jam illis pro-*

[power of administering both centred eventually in one and the same magistrate, who was equally intrusted to pronounce the rule of law, and to apply it to particular cases, by the principles of equity. It is true, that with us, the *aula regia*, which was the supreme court of judicature under the Conqueror, administered equal justice according to the rules of both law and equity, as the case might require: and when that antient court was subdivided into branches, with a more or less special jurisdiction appropriated to each branch, the idea of a court of equity, as distinguished from a court of law, does not appear to have occurred to any one; for though equity is mentioned by Bracton (*p*), as a thing contrasted to strict law, yet neither in that writer, nor in Glanvil or Fleta, nor yet in Britton, (composed under the auspices and in the name of Edward the first, and treating particularly of courts and their several jurisdictions,) is there a syllable to be found relating to the equitable jurisdiction of the Court of Chancery. Nor is it very clear in what manner or under what circumstances the administration of equity, as a matter distinct from law, was first established in this country; but it was probably the result of the *original writs* issued for the commencement of actions at law being of a very fixed and inflexible character; for it seems that, owing to this cause, there was a frequent failure of justice in the common law courts, and that the application for redress had to be made to the king in person, who was wont to refer the matter to his chancellor, for him to decide as the circumstances (*i.e.*, the equity) of the case should require; and apparently, in these early times the chief judicial employment of the chancellor was in devising new writs, directed to the courts of common law, to give remedy in cases

missis non esse standum, quis non videt, quæ coactus quis metu et deceptus dolo promiserit? Quæ quidem pleraque jure prætorio liberantur, nonnulla legibus."—Offic. l. i. x.

(*p*) L. ii. c. 7, fol. 23; also f. 3 a, s. 5; see Plowd. 467; also, Spence on the Equitable Jurisdiction of the Court.

[where none was before administered. And to quicken the diligence of the clerks in the Chancery, who were too much attached to antient precedent, it was provided by the Statute of Westminster the second (13 Edw. I.) c. 24, that "whensoever from thenceforth in one case a writ shall be "found in the Chancery, and in a like case, falling under "the same right and requiring the like remedy, no pre-"cedent of a writ can be produced, the clerks in Chancery "shall agree in framing a new writ: and if they cannot "agree, it shall be adjourned to the next parliament, "where a writ shall be framed by consent of the learned "in the law, lest it should happen for the future that the "court of our lord the king be deficient in doing justice to "the suitors."

This statute, which is commonly called "the Statute *in Consimili Casu*," probably accounts for the very great variety of writs of trespass *on the case*, to be met with in the register; whereby the suitor had ready relief, according to the exigency of his business, and adapted to the specialty, reason, and equity of his very case (*q*). And with a little pains on the part of the clerks of the Chancery, and a little liberality in the judges, the statute might have effectually saved the necessity of again recurring for extraordinary relief to the king or to his chancellor (*r*); but it appears that neither the pains nor the liberality were present; and when, about the end of the reign of King Edward the third, uses of land were introduced, and were wholly unrecognized by the courts of the common law, the separate jurisdiction of the Chancery, as a court of equity, began to be established (*s*); and John Waltham, who was bishop of Salisbury and chancellor to King

(*q*) Lamb. Archeion, 61.

(*r*) Blackstone (vol. iii. p. 52) remarks, that this was the opinion of Fairfax, a very learned judge in the time of Edward the fourth, who says, "*Le subpœna ne serroit "my cy soventement use come il est "ore, si nous attendomus tiels actions "sur les cases, et mainteinomus le "jurisdiction de ceo court, et d'auter "courts.*"—Year B. 21 Edw. 4, 23.

(*s*) Spelm. Gloss. 106; R. *v.* Standish, 1 Lev. 242.

[Richard the second (by a strained interpretation of the Statute *in Consimili Casu*) devised a writ of *subpœna*, returnable to the Court of Chancery only, to make the feoffee to uses accountable to his *cestui que use;* which process was afterwards extended by the same chancellor, and in spite of much obloquy and opposition, to other matters wholly determinable at the common law, upon fictitious suggestions,—fictions having in all early times been found a useful means of ameliorating the course of judicial procedure (*t*).

These *uses* of lands were from the first regarded by the ecclesiastical courts as binding in conscience. The clergy had in fact, so early as the reign of King Stephen, attempted to turn their ecclesiastical courts into courts of equity, by entertaining suits *pro læsione fidei*, as a spiritual offence against conscience, in the case of the nonpayment of debts or breach of any civil contract (*u*), till checked by the constitutions of Clarendon (*x*). And, although it is sometimes stated, that in the fourth year of King Henry the third suits *pro læsione fidei* in the ecclesiastical courts were adjudged to be contrary to law (*y*), still they appear to have been again recognized as in accordance with law in the statute *Circumspectè Agatis* (13 Edw. I.) (*z*); and it is certain that the chancellor (who was in those times invariably an ecclesiastic) was in no way eager to discountenance suits of this nature; and we find that, as a fact, suits *pro læsione fidei* continued to be brought in the ecclesiastical courts till late in the fifteenth century (*a*),

(*t*) Lord Chancellor Waltham was obliged in one instance to pay damages to the party aggrieved by what was thought an unfair extension of the subpœna. (See 17 Ric. 2, c. 6.)

(*u*) Lord Lyttelt. Hen. 2, Book 3, p. 361, note.

(*x*) 10 Hen. 2, c. 15; Speed. 468.

(*y*) Fitzh. Abr. tit. Prohibition, 15.

(*z*) Berthelet, Stat. Antiq. Lond. 1531, 90 b; 3 Pryn. Rec. 336, differing from Lyndewood, Prov. l. 2, t. 2, and from the Cotton MS. (Claud. D. 2).

(*a*) Year Book, 2 Hen. 4, 10; 11 Hen. 4, 88; 38 Hen. 4, 29; 20 Edw. 4, 10.

[when (it is said) they were finally prohibited by the unanimous veto of all the judges. And it appears from the parliament rolls (*b*), that in the reigns of Henry the fourth and fifth, the commons were repeatedly urgent to have the writ of *subpœna* itself entirely suppressed, as being a novelty against the form of the common law devised by the subtlety of Chancellor Waltham, whereby (it was said) no plea could be determined unless by examination and oath of the parties according to the form of the law civil and the law of holy Church, in subversion of the common law; and Henry the fourth yielded so far to this clamour as to pass the statute 4 Henry IV. c. 23, whereby judgments at law were declared irrevocable unless by attaint or writ of error; but Henry the fifth turned a deaf ear to the urgency of the commons; and in Edward the fourth's time, the process by bill and *subpœna* was become the established practice of the Court of Chancery (*c*).

The jurisdiction on *subpœna* in Chancery appears, however, to have been then and to have for a long time thereafter remained very limited in its extent; for in an antient treatise entitled *Diversité des Courtes* (*d*), and which is supposed to have been written very early in the sixteenth century, we have a catalogue of the matters of conscience then cognizable by *subpœna* in Chancery; and this catalogue contains but a very few matters. And further, no regular judicial system at that time prevailed in the court; but the suitor, when he thought himself aggrieved, found a desultory and uncertain remedy, according to the private opinion of the chancellor, who was rarely a professed lawyer, no professed lawyer having sat in the Court of Chancery from the times of the Chief Justices Thorpe and Knyvet, successively chancellors to King Edward

(*b*) Rot. Parl. 4 Hen. 4, Nos. 78 and 110; 3 Hen. 5, No. 46, cited in Prynne's Abr. of Cotton's Records, 410, 422, 424, 548; 4 Inst. 83; 1 Roll. Abr. 370, 371, 372.

(*c*) Rot. Parl. 14 Edw. 4, No. 33 (not 14 Edw. 3, as cited 1 Roll. Abr. 370, &c.).

(*d*) Tit. Chancery, fol. 296, Rastell's edit. A.D. 1534.

[the third, in 1372 and 1373 (*e*), to the promotion of Sir Thomas More to the chancellorship by King Henry the eighth, in 1530. After which the Great Seal was indiscriminately committed to the custody of lawyers, or courtiers (*f*), or churchmen (*g*), according as the convenience of the times and the disposition of the prince required; till Serjeant Puckering was made lord keeper in 1592: from which time to the present, the office of Lord Chancellor has always been filled by a lawyer, excepting the short interval from 1621 to 1625, when the seal was entrusted to Dr. Williams, then Dean of Westminster, but afterwards Bishop of Lincoln, and who had been chaplain to Lord Ellesmere, when chancellor (*h*).

In the time of Lord Ellesmere (A.D. 1616), the great dispute between the courts of law and equity, set on foot by Sir Edward Coke, then chief justice of the Court of King's Bench, reached a crisis,—the dispute centering mainly round the question whether a court of equity could give relief after or against a judgment of the common law. This contest was so warmly carried on, that indictments were preferred against the suitors, the solicitors, the counsel, and even a master in chancery, for having incurred a *præmunire*, by questioning, in a court of equity, a judgment in the Court of King's Bench, obtained by gross fraud and imposition (*i*). The matter was brought before the king, and by him referred to his learned counsel for their advice and opinion; and they having reported in favour of the courts of equity, his majesty gave judgment on their behalf (*k*). But it is characteristic of the heat of the dispute, and of the superior favour in which Lord Ellesmere was held by King James the first as compared

(*e*) Spelm. Gloss. 111; Dugd. Chron. Ser. 50.

(*f*) Wriothesley, St. John, and Hatton.

(*g*) Goodrick, Gardner, and Heath.

(*h*) Biog. Brit. 4278.

(*i*) Bacon's Works, iv. 611, 612, 632.

(*k*) Whitelocke of Parl. ii. 390; 1 Chan. Rep. Append. 11.

[with the Lord Chief Justice Coke, that the king also interposed his prerogative in affirmance of the jurisdiction of the Court of Chancery; and although the Lord Chief Justice submitted (*l*),—not protesting as he did in the case on *commendams* (*m*),—still the mistaken attitude which he had assumed, coupled with his want of tact, led shortly afterwards to his suspension, and eventually to his removal, from the chief justiceship (*n*).

Lord Bacon, who succeeded Lord Ellesmere, reduced the practice of the court into a more regular system; but he did not sit long enough to effect any considerable revolution in the science itself, and but few of his decrees have been of any great consequence to posterity. Nor did his successors, in the reign of Charles the first, do much to improve the system; and after the restoration of Charles the second, the seal was committed to the Earl of Clarendon, who had withdrawn from practice as a lawyer for nearly twenty years; and subsequently to the Earl of Shaftesbury, who, (though a lawyer by education,) had never practised at all. But a happier state of things began with Sir Heneage Finch, afterwards Earl of Nottingham, who succeeded to the chancellorship in 1673, and who is reported to have been a man of the greatest abilities and most uncorrupt integrity, a thorough master and zealous defender of the laws, and of a genius which enabled him to discover and to pursue the true spirit of justice through and

(*l*) See the entry in the Council Book, 26th July, 1616 (Biogr. Brit. 1390).

(*m*) This was the case of the Bishop of Winchester, in which King James, conceiving that the matter affected his prerogative, sent letters to the judges not to proceed in it till he himself had been first consulted; and the twelve judges joined in a memorial to his majesty, declaring that their compliance would be contrary to their oaths and the law; but upon being brought before the king and council, they all (save the Lord Chief Justice) retracted and promised obedience in every such case for the future. (Biogr. Brit. 1388.)

(*n*) See Lord Ellesmere's speech to Sir Henry Montague, the new chief justice, 15th November, 1616. (Moor's Reports, 828.)

[notwithstanding all its technical embarrassments. The then great extension of trade and the then recent abolition of the military tenures, co-operated, moreover, with the abilities and genius of that Lord Chancellor; and he was enabled, in the course of nine years, to build up a system of jurisprudence and jurisdiction upon wide and rational foundations; and he has consequently been regarded as the founder and Justinian of the more modern equitable system, although that was afterwards extended and improved by other great men his successors in the chancellorship.

The judicial duties of the Court of Chancery were from an early period shared in some measure by the Master of the Rolls,—an officer of great dignity, and who, although originally appointed only for the superintendence of the writs and records appertaining to the common law side of the court (*o*), yet afterwards sat on the equity side as a separate though subordinate judge (*p*). Concerning the authority of the Master of the Rolls to hear and determine causes, and his general power in the Court of Chancery, there were at one period divers questions and disputes very warmly agitated; to quiet which it was declared, by 3 Geo. II. c. 30, that all orders and decrees by him made, except such as by the course of the court were appropriated to the Great Seal alone, should be deemed to be valid, subject nevertheless to be discharged or altered by the Lord Chancellor (*q*);] and by a modern enactment, 3 & 4 Will. IV. c. 94, s. 24, the Master of the Rolls (subject to the same qualification) was specially directed to hear

(*o*) 4 Inst. 82; 44 & 45 Vict. c. 68.

(*p*) The Master of the Rolls was at one time the chief of a body of officers of the court (with certain judicial as well as administrative powers), who were called the *Masters in Chancery;* among whom was included the *Accountant-General;* but these offices have now been abolished (see 15 & 16 Vict. c. 80, s. 59; 17 & 18 Vict. c. 100; 23 & 24 Vict. c. 149, s. 1; 35 & 36 Vict. c. 44).

(*q*) 3 Bl. Com. 450. See 7 Will. 4 & 1 Vict. c. 46, and 36 & 37 Vict. c. 66, s. 13, as to the salary of the Master of the Rolls; and 1 & 2 Vict. c. 94, as to his custody of the public records.

motions, pleas, and demurrers, as well as causes generally, which should be set down for hearing before him (*r*). But the business of the Court of Chancery latterly increased to such an extent, that the Lord Chancellor and the Master of the Rolls together became unable to cope with it effectively; and it was found necessary, in the year 1813, to appoint another assistant to the Lord Chancellor, in his judicial functions, under the title of Vice-Chancellor of England (*s*); and after the transfer to the Court of Chancery of the equity business of the Exchequer, which took place in the year 1841, two more Vice-Chancellors were added to its judicial list (*t*),—each of the three Vice-Chancellors sitting, (like the Master of the Rolls,) separately from the Lord Chancellor. A further addition was afterwards made of two judges, called the Lords Justices of the *Court of Appeal* in Chancery (*u*); and this court of appeal consisted, when the Judicature Acts came into operation, of the Lord Chancellor together with these two Lords Justices; and such court of appeal possessed all the jurisdiction exercised by the Lord Chancellor himself, so far as the judicial business in Chancery was concerned; and from this court of appeal an ultimate appeal lay to the House of Lords. But the Lord Chancellor might still have sate alone to hear appeals from the Court of Chancery; and he and the court of appeal might also have re-heard their own decisions,—whereby the necessity of appealing to the House of Lords was in many cases obviated. And thus much for the Court of Chancery, prior to its union with, and as a division of, the Supreme Court of Judicature to be hereinafter mentioned.

II. The Court of Queen's Bench.—This Court was so called because the sovereign used formerly to sit there

(*r*) See 36 & 37 Vict. c. 66, s. 16, sub-s. 1.

(*s*) 53 Geo. 3, c. 24.

(*t*) 5 Vict. c. 5, s. 19; 14 & 15 Vict. c. 4; and 15 & 16 Vict. c. 80, ss. 52—58.

(*u*) 14 & 15 Vict. c. 83, and 30 & 31 Vict. c. 64.

in person; whence the style of the court was *coram ipsâ reginâ* or (as the case might be) *coram rege seipso;* and this court was the supreme court of common law in the kingdom (*x*). [Yet, though the sovereign himself used to sit in this court, and still in contemplation of law is supposed so to do, he did not, neither by law is he empowered to, determine any cause or matter but by the mouth of his judges, to whom he has committed his whole judicial authority (*y*). This court was not, nor could be, from the very nature and constitution of it, fixed to any certain place, but followed the sovereign's person wherever he went; for which reason all process which issued out of this court in the sovereign's name was originally made returnable *ubicunque fuerimus in Angliâ.* It had, indeed, for some centuries past, usually sat at Westminster, being an antient palace of the crown; but it might have removed with the sovereign to York, or Exeter, if he thought proper to command it; and in point of fact, after Edward the first had conquered Scotland, it sat at Roxburgh, in that kingdom (*z*); and by a special provision contained in the *Articuli super Cartas*, the king's chancellor, and the justices of his bench, were by law required to follow the sovereign, so that he might have at all times near unto him some officials learned in the law (*a*).

The jurisdiction of this court was very high and transcendent. It kept all inferior jurisdictions within the bounds of their authority, and might either remove their proceedings to be determined before it, or prohibit their further progress below (*b*). It superintended all civil corporations in the kingdom. It commanded magistrates and others to do what their duty required, in every case

(*x*) 4 Inst. 73.

(*y*) The king used to decide causes in person, in the old *Aula Regia*. "*In curiâ domini regis ipse in propriâ jura decernit.*"—(Dial. de Scacch. l. i. s. 4.) And James the first is said to have sat in the King's Bench in person, but to have been informed by his judges that he could not deliver an opinion.

(*z*) M. 20, 21 Edw. 1; Hale, Hist. C. L. 200.

(*a*) 28 Edw. 1, c. 5.

(*b*) Farquharson *v.* Morgan, (1894) 1 Q. B. 552.

[where there was no other specific remedy. It protected the liberty of the subject by a speedy and summary interposition. It took cognizance of both criminal and civil causes,—the former in what was called the crown side (*c*), and the latter in the plea side of the court (*d*). The jurisdiction of the crown side it is not our present business to consider (*e*);] on the plea side, or civil branch, it enjoyed (though originally by usurpation grounded on a legal fiction) (*f*) a general jurisdiction and cognizance over all actions between subject and subject, excepting matters affecting the revenue of the crown, which matters (as we shall presently see) were assigned to the Court of Exchequer, and excepting matters appertaining to the realty, which were within the exclusive jurisdiction of the Court of Common Pleas. And from the judgments of the Queen's Bench, proceedings by way of error lay ultimately to the House of Lords; but firstly to the *Exchequer Chamber*,—a court which was originally constituted as a court of error for the Court of Exchequer, by 31 Edw. III. st. 1, c. 12, but which was afterwards remodelled by

(*c*) 6 & 7 Vict. c. 20; 23 & 24 Vict. c. 54; the Crown Suits Act, 1865 (28 & 29 Vict. c. 104); and the Crown Office Rules, 1886.

(*d*) 6 Geo. 4, c. 82.

(*e*) Vide post, Book v., chap. xii. and xv. and Book vi.

(*f*) This usurpation of the Court of Queen's Bench originated as follows:—The jurisdiction of the court in civil actions was formerly confined to actions of trespass, or other injury committed *vi et armis*, and to civil actions (other than actions real), in which the defendant was an officer of the court, or was in the custody of the marshal of the court; and in order to extend the jurisdiction to actions against *any* defendant, the fiction was invented of *surmising* that the defendant had committed a breach of the peace in Middlesex or any other county in which the court sat, and in which it was consequently held to possess an extraordinary criminal jurisdiction; and by aid of this false suggestion, a writ, called a bill of Middlesex, or a writ of *latitat* founded on a bill of Middlesex (as the case might be), was issued against him; by virtue of which he was *supposed to be committed to the custody of the marshal*, so as to bring him within the jurisdiction of the court; and to this was added, under the *ac etiam* clause, the ground of action which it was the real intention of the parties to try.

11 Geo. IV. & 1 Will. IV. c. 70, s. 8, and was thereby constituted a court of error or of appeal from the judgments of all the three superior courts of common law,—the judges of the Court of Exchequer Chamber being the judges of the three superior courts, other than of the court whose judgment was to be revised, that is to say, the King's Bench and Exchequer sitting on appeals from the Common Pleas; and so, as the case required.

III. The Court of Common Pleas (otherwise sometimes called the Court of Common Bench).—This Court took cognizance of all actions between subject and subject, including real actions, and actions appertaining to the realty; and over real actions (properly so called), this Court exercised originally an *exclusive* jurisdiction; as also over fines and recoveries, while those modes of assurance existed, and over the forms of conveyance by deed acknowledged which (in the case of married women) were afterwards substituted for them; hence the court was always considered as the principal seat of learning relative to ordinary actions between man and man, and is styled by Lord Coke, the lock and key of the common law (*g*). The court was also, in modern times, entrusted by the legislature with an exclusive jurisdiction in election matters, on appeal from the decisions of revising barristers; and in matters arising under the Parliamentary Elections Act, 1868 (*h*), or under the Corrupt Practices (Municipal Elections) Act, 1872 (*i*). And from the judgments of this court, proceedings in error lay, primarily to the Exchequer Chamber, and ultimately to the House of Lords.

IV. The Court of Exchequer,—the origin of which was as follows:—[By the antient Saxon constitution there was only one superior court of justice in the kingdom, having

(*g*) 4 Inst. 99.
(*h*) 31 & 32 Vict. c. 125.
(*i*) 35 & 36 Vict. c. 60.

[cognizance of both civil and spiritual cases; viz., the *witten-agemote* or general council, which assembled annually, or oftener, as well to do private justice as to consult upon public business. At the Conquest, the ecclesiastical jurisdiction (as we have seen) was diverted into another channel; and the Conqueror contrived also to separate the ministerial power of this general council (that is to say, the functions of the judges) from the deliberative power of the council (that is to say, the functions of the counsellors to the crown); and for effecting this separation, he established a constant court in his own hall, thence called by Bracton and other antient authors the *aula regia* or *aula regis* (*k*), composed of the king's great officers of state resident in his palace, and usually attendant on his person,—such as the lord high constable and lord mareschal, who chiefly presided in matters of honour and of arms, determining respectively according to the law military and the law of nations,—and such as the lord high steward and lord great chamberlain; the steward of the household; the lord chancellor, whose peculiar business it was to keep the king's seal, and examine all such writs, grants and letters as were to pass under that authority; and the lord high treasurer, who was the principal adviser in all matters relating to the revenue. And these high officers were assisted by certain persons learned in the laws, called the king's justiciars or justices, and by the greater barons of parliament,—all of whom had a seat in the *aula regia*, and they formed a kind of court of appeal, or rather of advice, in matters of great moment and difficulty. All these, in their several departments, transacted all secular business, both criminal and civil, and likewise the matters of the revenue; and over all presided one special magistrate, called the chief justiciar, or *capitalis justiciarius totius Angliæ;* who was also the principal minister of state, the second man in the kingdom, and, by virtue of his office,

(*k*) Lib. 3, tr. 1, c. 7; 3 Turn. Hist. Ang.-Sax. p. 177.

[guardian of the realm in the king's absence. And this officer it was who principally determined all the vast variety of causes that arose in this extensive jurisdiction; and, from the plenitude of his power, he grew at length both obnoxious to the people and dangerous to the government which employed him (*l*); and therefore King John, who dreaded also the power of the chief justiciar, very readily consented to that article which now forms the eleventh chapter of Magna Charta, and which enacts, that "*communia placita non sequantur curiam regis, sed teneantur in aliquo loco certo.*" This "certain place" was established in Westminster Hall, the place where the *aula regis* had originally sat, when the king resided in Westminster; and the court being thus rendered fixed and stationary, the judge became so too, and a chief, with other justices, of the Common Pleas, was thereupon appointed; with jurisdiction (as already mentioned) to hear and determine all pleas of land, and injuries merely civil between subject and subject. And the court of the *aula regia* being thus stripped of so considerable a branch of its jurisdiction, its authority declined apace, under the long and troublesome reign of King Henry the third; and in the reign of Edward the first (who new modelled the whole frame of our judicial polity), the court was further subdivided and broken up into distinct courts of judicature. The high steward, with the barons of parliament, formed an august tribunal for the trial of delinquent peers; and the same barons reserved to themselves in parliament the right also of reviewing in the last resort the sentences of other courts; but as regards the dispensation of justice between man and man, that was arranged in this wise, namely:—the Court of Chancery issued all original writs under the great seal to the other courts: the Exchequer managed the king's revenue: the Common Pleas determined all causes between private subjects; and the Court of King's

(*l*) Spel. Gl. 331, 332, 333; Gilb. Hist. C. P. Introd. 17.

[Bench retained all the jurisdiction which was not cantoned out to these other courts, and particularly the sole cognizance of pleas of the crown, or criminal causes (*m*).]

The Court of Exchequer, then, (to which our attention is at present to be particularly directed,) was at first intended principally to order the revenues of the crown, and to recover the king's debts and duties (*n*); though it afterwards acquired (by usurpation grounded on a legal fiction) (*o*) the additional character of an ordinary court of justice between subject and subject. The court is said to have derived its name from the chequed cloth (*Scaccarium*), resembling a chess board, which covered the table there, and on which, when certain of the king's accounts were made up, the sums were marked and scored with counters (*p*); and it consisted of two divisions, the *Receipt* of the Exchequer,—for the management of the royal

(*m*) The King's Bench originally retained the superintendence of the other two superior courts, and after judgment given by either of these, recourse might be had to it to correct any error of *law* in the proceedings; but this superiority it lost under 11 Geo. 4 & 1 Will. 4, c. 70, s. 8.

(*n*) 4 Inst. 103—116; Attorney-General *v.* Sewell, 4 Mee. & W. 77.

(*o*) This usurpation of the Court of Exchequer originated as follows:—According to its original constitution, it was the duty of this court to call the king's farmers and debtors to account; and these farmers and debtors were privileged, in their turn, to sue and implead in the same court all persons owing them money,—and for this purpose, they resorted to a writ called a *quo minus*, in which the plaintiff suggested that he was the king's farmer or debtor, and that the defendant had done him the injury or damage complained of, *quo minus sufficiens existit* ("by which he is the less able") to pay the king his debt or rent; and by gradual connivance, this *surmise* of being debtor to the king was allowed to be inserted by plaintiffs who were not in fact debtors to the king at all, and came to be considered as mere words of course, so as to open the court to litigants generally. Moreover, the same fiction was permitted on the equity side of the court. And when the writ of *quo minus* was abolished, by 2 & 3 Will. 4, c. 39, the new method which was then substituted, gave a direct and proper jurisdiction to this court, in matters of private debt generally.

(*p*) 3 Bl. Com. 44.

revenue (*q*); and the *Court*, or *judicial* part of it, with which alone we are at present concerned.

This court was, from the time of the separation of the Exchequer from the *aula regia* down to comparatively modern times, subdivided into a court of equity and a court of common law (*r*); but by the statute 5 Vict. c. 5, the equitable jurisdiction of the court (and which jurisdiction did not comprise its revenue jurisdiction) (*s*) was transferred to the Court of Chancery. The Court of Exchequer, therefore, when the Judicature Acts came into operation, consisted of a *revenue* side and of a common law or *plea* side,—in its capacity of a court of law on the revenue side, ascertaining and enforcing, by proceedings appropriate to the case, the proprietary rights of the crown against the subjects of the realm (*t*); while in its capacity of a court of common law on the plea side, it administered redress between subject and subject, in all actions personal, but not in the actions of *dower* and *quare impedit*, which were the two real actions then still continuing; and from the judgments of this court, proceedings in error lay primarily to the Exchequer Chamber, and ultimately to the House of Lords.

V. The High Court of Admiralty.—This court had jurisdiction to try and determine all *maritime* causes, that is, all injuries committed on the high seas (*u*): and generally

(*q*) As to the receipt of the Exchequer, vide sup. vol. II. p. 521.

(*r*) 3 Bl. Com. 45.

(*s*) Attorney-General *v.* Hallett, 15 Mee. & W. 687. By 5 & 6 Vict. c. 86, certain offices on the revenue side were abolished; and the business thereof was transferred to *her Majesty's Remembrancer in the Exchequer;* and by 22 & 23 Vict. c. 21, and 24 & 25 Vict. c. 92, the office of Queen's Remembrancer was regulated, and the practice and procedure on the revenue side of the Court of Exchequer was amended; and "general rules" were issued for these purposes. (See 7 H. & N. 505.)

(*t*) 28 & 29 Vict. c. 104; 44 & 45 Vict. c. 68; Ord. lxviii. (1883), rr. 2, 3 and 4; and the Crown Office Rules, 1886.

(*u*) We may remark here, that, under the Judicature Acts, in any cause or proceeding for damages arising between *two ships*, if both

speaking, and with the exception of any case otherwise provided for by Act of Parliament (*x*), all causes so triable must have been causes arising wholly upon the sea, and not within the precincts of any county. [For the statute 13 Ric. II. st. 1, c. 5, directed that the admiral and his deputy should not meddle with any thing, save such as were done upon the sea: and the statute 15 Ric. II. c. 3 declared, that the court of the admiral had no manner of cognizance of any contract or of anything done within the body of any county, either by land or by water (*y*); nor of any wreck of the sea, for that must be cast on land before it becomes a wreck; but it was otherwise with regard to *flotsam*, *jetsam*, and *ligan*, and also (under the provisions of particular statutes) with regard to *salvage*.

Where part of a contract (or other cause of action) arose upon the sea, and part upon the land, the common law excluded the Admiralty Court from its jurisdiction; for, part belonging properly to one cognizance, and part to another, the common or general law had the preference of the particular (*z*). And therefore, though purely maritime acquisitions, which are earned and become due wholly on the high seas—as seamen's wages—fall properly within the admiralty jurisdiction, even though the contract for them be made upon land (*a*); yet, in general, if there be a contract made in England, and to be executed upon the seas—as a charter-party or covenant that a ship shall sail to Jamaica, or shall be in such a latitude by such a day;

ships shall be found to have been in fault, the rules theretofore in force in the Court of Admiralty are made to prevail over (so far as they were at variance with) the rules in force at the common law; therefore in such cases the loss will now be borne in a just proportion between the two ships, instead of neither of them (on the ground of contributory negligence) recovering, as at the common law, damage against the other (The Bernina, Mills *v.* Armstrong, 12 P. D. 58; 13 App. Ca. 1).

(*x*) 3 & 4 Vict. c. 65.

(*y*) As to what is *intra corpus comitatûs*, see Com. Dig. Admiralty (E. 14); Jac. Law Dict. "Admiral."

(*z*) Co. Litt. 261.

(*a*) 1 Ventr. 146.

[or if a contract be made upon the sea to be performed in England,—as a bond made on shipboard to pay money in London, or the like,—these kinds of mixed contracts belong not to the admiralty jurisdiction, but to the courts of common law (*b*). It is to be observed, however, that where the Admiralty Court has jurisdiction of the original subject-matter in the cause, it also has jurisdiction of all consequential questions, though these latter would otherwise be properly determinable at the common law (*c*). Wherefore, among other reasons, a suit for beaconage of a beacon standing on a rock in the sea, might be brought in the Court of Admiralty; the admiral having an original jurisdiction over beacons (*d*).] Also, and in addition to its general jurisdiction over maritime causes, the Court of Admiralty, under a special commission in that behalf, adjudicated on *prize of war* (*e*) ; and also (when the matter was specially referred to it by the Crown) (*f*) on *booty of war*, *i. e.*, prize on shore.

The High Court of Admiralty adopted into its practice many of the principles of the civil law ; and also, as occasion required, made use of other laws, such as the Rhodian laws, and the laws of Oleron—bodies of law derived respectively from places antiently celebrated in naval affairs, viz., the island of Rhodes in the Mediterranean, and the island of Oleron in France (*g*). And from the sentence of the admiralty judge, an *appeal* used to lie in general to the Court of Delegates, when that tribunal existed; and from certain of the "vice-admiralty courts" (that is to say, courts with an admiralty jurisdiction established in her Majesty's possessions

(*b*) Bridgeman's case, Hob. 23 ; Hale, Hist. C. L. 35 ; Le Caux *v.* Eden, Doug. 572.

(*c*) 13 Rep. 53 ; Ridley *v.* Egglesfield, 2 Lev. 25 ; Hardr. 183.

(*d*) Crosse *v.* Digges, 1 Sid. 158.

(*e*) 2 Chit. Gen. Pr. 538 a ; 1 Doug. 594 ; Lindo *v.* Rodney, 2 Doug. 613, n. ; Mitchell *v.* Rodney (in error), 2 Bro. P. C. 423 ; Faith *v.* Pearson, 6 Taunt. 439.

(*f*) 3 & 4 Vict. c. 65, s. 22 ; The Banda and Kirwee Booty, Law Rep., 1 Ad. & Ecc. pp. 109—269.

(*g*) Hale, Hist. C. L. 36 ; Co. Litt. 11.

beyond the seas), appeals might be brought either before the Court of Admiralty in England, or before the sovereign in council (*h*); [but in the particular case of prize vessels taken in time of war in any part of the world, and condemned in any courts of admiralty or vice-admiralty as lawful prize, the appeal lay to certain commissioners, consisting chiefly of the privy council, and called Lords Commissioners in Prize Cases. And this was by virtue of divers treaties with foreign nations, by which courts were established in all the maritime countries of Europe, for the decision of this question, "whether lawful prize or not?"; for this being a question between subjects of different states, it belongs entirely to the law of nations, and not to the municipal laws of any one country to determine it.] However, by 2 & 3 Will. IV. c. 92, the appellate jurisdiction of the court of delegates was transferred to the sovereign in council; and by 3 & 4 Will. IV. c. 41, s. 2, appeals in prize suits, and other proceedings in the admiralty or vice-admiralty courts, or in any other court abroad, which might at the date of that Act have been made either to the High Court of Admiralty or to the Lords Commissioners in Prize Cases, were directed in future to be made to the sovereign in council; and by the statute last named, and by 6 & 7 Vict. c. 38, and 7 & 8 Vict. c. 69, the Privy Council was empowered to refer all such appeals to the Judicial Committee thereof; and although the 3 & 4 Will. IV. c. 41, s. 2, has been repealed by the Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27), still, under the new provisions contained in the last mentioned Act, which is stated above, regarding this jurisdiction of the admiralty, and regarding the right of appeal to the Privy Council, remains good. And by the 54 & 55 Vict. c. 53, s. 4, it is expressly enacted that the High Court of Justice (Admiralty Division) shall be a Prize Court within the meaning of the Naval Prize Act, 1864 (27 & 28 Vict.

(*h*) 3 Bl. Com. 69.

c. 25), and shall have all the jurisdiction of the Court of Admiralty; and that the appeal therefrom shall be to the Privy Council.

VI. and VII. Of the other courts united and consolidated into the Supreme Court of Judicature, namely, the Court of *Bankruptcy*, the Court of *Probate*, and the Court of *Divorce and Matrimonial Causes*, it will be sufficient here barely to make mention, as there will be found in other parts of this work such notice of each of them as is consistent with our limits (*i*).

Such having been the several courts which under the Judicature Acts before referred to were united and consolidated together into the High Court of Justice, we shall now proceed to briefly describe the judges who presided over them, at the date of such union and consolidation. And firstly, with regard to the Court of Chancery, we have already said enough regarding the judges of that court; but secondly, with regard to the Courts of Queen's Bench, Exchequer, and Common Pleas,—which were usually described collectively "as the superior courts of common law," or, as the "courts at Westminster,"—they were each presided over by a chief justice (called in the Court of Exchequer the Chief Baron); and comprised in addition certain "puisne" judges, who, in the Court of Exchequer, were designated "Barons." All of these judges taken collectively were often popularly called, by way of pre-eminence, the *judges of the land*, or simply *the judges;* and they were of high dignity and precedence,—taking rank before baronets, and being, as was formerly remarked, the constitutional advisers of the House of Lords in matters of law. The number of them varied at different periods of our legal history (*k*); it remained

(*i*) Vide sup. vol. II. pp. 149, 188, 246.

(*k*) Dugd. Orig. Jurid. c. 18.

fixed for a long period at twelve; but in consequence of the increase of business, an additional judge was appointed about the beginning of the reign of Will. IV. to each of the three courts (*l*); and by 31 & 32 Vict. c. 125, a further increase in their number was authorized with reference to the jurisdiction conferred upon them by that statute in the trial of election petitions (*m*). And it was provided, by 30 & 31 Vict. c. 68, that certain parts of the business of the courts which used to be before the judges sitting in chambers, might be dealt with (in the first instance, and subject to an appeal to the judge) by the *Masters* of the courts under general rules issued for that purpose (*n*). These judges were all created by letters patent; and by 12 & 13 Will. III. c. 2, they were made irremovable, except upon the address of both houses of parliament. The title of the chief judge of the Court of Queen's Bench was the "Lord Chief Justice of England;" and he had a salary of 8,000*l.* a year; while the Lord Chief Justice of the Court of Common Pleas, and the Lord Chief Baron of the Court of Exchequer of Pleas, had each a salary of 7,000*l.* a year, the other judges of the three superior courts of common law having a uniform salary of 5,000*l.* a year each. And with regard to the High Court of Admiralty, that court was presided over by a judge appointed by the Crown (who formerly sat as the Lord High Admiral's deputy); and who also (but by virtue of separate commissions) presided over the Instance Court and the Prize Court. Lastly, the Court of Bankruptcy was presided over by one of the Vice-Chancellors of the Court

(*l*) 11 Geo. 4 & 1 Will. 4, c. 70, ss. 1, 2.

(*m*) 31 & 32 Vict. c. 125, s. 11.

(*n*) The business which can be transacted by the Masters for the judges now depends upon Ord. liv. (1883), rr. 11 and 12. It includes everything that can be transacted by a judge at chambers, with certain specified exceptions. It may be noticed that, by 42 & 43 Vict. c. 78, and Ord. liv. (1883), rr. 13—16, the offices of the Masters of the Supreme Court have been rearranged on a fresh basis, and a Central Office established,—which office is placed under the joint control of the Masters.

of Chancery; and the Court of Probate and the Court of Divorce and Matrimonial Causes were presided over, respectively, by the "judge of the Probate Court," as established by 20 & 21 Vict. c. 77, and (except at the sittings of the full Court of Divorce) by the "judge ordinary," as established by 20 & 21 Vict. c. 85, in manner formerly mentioned (*o*).

Such being the different courts, and the judges of the different courts, out of which Her Majesty's High Court of Justice is composed, it is next to be remembered, that the High Court forms one of two permanent Divisions of the Supreme Court of Judicature,—the other Division being Her Majesty's Court of Appeal; and the remainder of this chapter shall be devoted to a consideration of these two Divisions of the Supreme Court in their order.

Firstly, the High Court of Justice.—This court is constituted a superior court of record; and to it is transferred the jurisdiction which, when the Judicature Acts came into operation, belonged to all and any of the several courts of which we have already spoken in this chapter; as also the common law jurisdiction which at the same date belonged to the Palatinate Courts of Lancaster and Durham; and also the jurisdiction appertaining to all such courts as were created by commissions of assize, of oyer and terminer, and of gaol delivery, or by any of such commissions. And of the palatinate courts, and of the assize courts, some account may be here desirable.

In the counties palatine of Lancaster and Durham, there were, at the date of the Judicature Acts, courts both of law and of equity, held before the respective chancellors of those

(*o*) Vide sup. vol. II. pp. 188, 246. It may be noticed, that the "full Court of Divorce," consisting of the Lord Chancellor, the Judge Ordinary, and certain of the common law judges, still existed, notwithstanding the Judicature Acts, 1873, 1875, and was the proper court of appeal from the decision of the Judge Ordinary (see Westhead *v.* Westhead and Gordon, 2 P. D. 1); but such appeal is now to the Court of Appeal, as in the case of ordinary appeals (see 44 & 45 Vict. c. 68, Judicature Act, 1881, s. 9).

counties palatine, or before judges specially commissioned for that purpose (*p*). Of the counties palatine themselves we have spoken in another place (*q*); and here it is proper further to remark, that the courts therein were formerly exempt from the ordinary process of the courts at Westminster; [for as originally all *jura regalia* were granted to the courts of these counties palatine, they had, within their own provinces, the sole administration of justice by their own judges appointed by themselves and not by the crown; and it would, therefore, have been incongruous for the king to have sent his writ to direct the judge of another's court in what manner to administer justice between the suitors.] And even after these counties were re-united to the crown, the maxim still continued to prevail, that the ordinary writs ran not into a county palatine; and, therefore (until a recent period), all process issuing out of the superior courts at Westminster, and intended to be executed in one of those counties, used to be directed in the first instance to the chancellor thereof, who thereupon issued his mandate to the sheriff. And though the judges of assize went into the counties palatine, and tried causes depending in the courts there, they sat by virtue

(*p*) 4 Inst. 213, 218; Finch, R. 452. It may be useful to refer also to the following courts, which were analogous, more or less, to the palatine courts, viz., (1) The courts of the *cinque ports*, whose jurisdiction in civil proceedings was taken away by 18 & 19 Vict. c. 48, ss. 1, 2, and 20 & 21 Vict. c. 1; (2) *The Court of the Duchy Chamber of Lancaster*, which has a concurrent jurisdiction with Chancery as to matters in equity relating to lands holden of the Crown in right of that duchy (Owen *v.* Holt, Hob. 77; Fisher *v.* Patten, 2 Ley, 74),—which, as Blackstone (vol. iii. p. 78) remarks, is a thing very distinct from the county *palatine* of Lancaster, inasmuch as it includes much territory at a distance from the county palatine, and particularly a very large district surrounded by the city of Westminster; and (3) the *Barmote* Courts, for the regulation of the mines, and for deciding questions of title and other matters relating thereto, in certain mining districts belonging to the duchy of Lancaster. (See 14 & 15 Vict. c. 94; and Bainbridge on Mines, 4th ed., by Brown, pp. 144, 145.)

(*q*) Vide sup. vol. i. pp. 131, 132.

of a special commission from the crown in its capacity of owner of the franchise, and under the seal of the chancellor thereof, and not by the usual commission under the Great Seal of England. But it formed one of the provisions of the Judicature Acts, that henceforth the counties palatine of Lancaster and Durham should respectively cease to be counties palatine so far as respects the issue of special commissions of assize or other like commissions, but not further or otherwise (*r*); and that commissions might be issued for the trial of all causes and matters within such counties respectively, in the same manner in all respects as in any other counties of England and Wales (*s*); and that there should be transferred to the High Court of Justice all the jurisdiction which at the time the Acts came into operation was vested in or capable of being exercised either by the Court of Common Pleas at Lancaster, or by the Court of Pleas at Durham (*t*); but the Chancery jurisdiction of either county palatine was not affected by these Acts (*u*).

With respect to the courts of assize, it is to be observed, that these consist of two or more commissioners, usually called judges of assize, who are sent, by special commission from the crown, on *circuits* all over the kingdom, to try, by a jury of the respective counties, the truth of such matters of fact as are then under dispute in the High Court of Justice:—there being, however, as to London and Middlesex, this exception, that instead of their being comprised within any circuit, courts for the trial of issues of fact by a jury are held there, before one or more of the judges of the High Court, four times in every year, at what are called the London and Middlesex *sittings* (*x*). [These judges of assize came into use in the room of the antient justices in eyre, *justiciarii in itinere;* who were regularly

(*r*) 36 & 37 Vict. c. 66, s. 99.
(*s*) Ibid.
(*t*) Sect. 16.
(*u*) See 13 & 14 Vict. c. 43; In re Alison's Trusts, 8 Ch. D. 2.
(*x*) Ord. lxiii. (1883), r. 1; 54 & 55 Vict. c. 14 (The Judicature, London Causes, Act, 1891).

[established, if not first appointed, by the Parliament of Northampton, A.D. 1176, in the twenty-second year of Henry the second, with a delegated power from the king's great court or *aula regia*, being looked upon as members thereof (*y*) : and they afterwards made their circuit over the kingdom, once in seven years, for the purpose of trying causes (*z*). They were afterwards directed, by *Magna Charta*, c. 12, to be sent into every county once a year to hold the assizes, *i. e.*, to receive the verdict of the jurors or recognitors in certain actions, called recognitions or assizes; the most difficult of which they were directed to adjourn into the Court of Common Pleas to be there determined. The itinerant justices sometimes held special commissions of assize, or of dower, or of gaol delivery, and the like; and they had sometimes a more general commission, to determine all manner of causes, being constituted *justiciarii ad omnia placita* (*a*)]. But as a general rule, the commissioners of assize in our own day consist exclusively of the judges of the High Court of Justice, to whom the duty is confided of superintending the trial of matters of fact at the assizes and sittings,—besides that of deciding matters of law and transacting other judicial business there,—each constituting a court, in his own person, of the High Court of Justice.

The justices or commissioners of assize, as originally appointed under 13 Edw. I. c. 30, were directed [to be assigned out of the king's sworn justices, associating to themselves one or two discreet knights of each county; and by the statute 27 Edw. I. c. 4, (explained by 12 Edw. 2, c. 3,) assizes and inquests were allowed to be taken before any one justice of the court in which the plea

(*y*) Seld. Jan. l. 2, s. 5; Spelm. Cod. 329.

(*z*) Co. Litt. 293.—"*Anno* 1261, *justiciarii itinerantes venerunt apud Wigorniam in octavis S. Johannis baptistæ;—et totus comitatus eos admittere recusavit, quod septem anni nondum erant elapsi, postquam justiciarii ibidem ultimo sederunt.*"—(Annal. Eccl. Wigorn. in Whart. Angl. Sacr. i. 495.)

(*a*) Bract. l. 3, tr. 1, c. 11.

[was brought, associating to himself one knight or other approved man of the county; and by the statute 14 Edw. III. st. 1, c. 16, inquests of *nisi prius* might be taken before any justice of either bench, (though the plea were not depending in his own court,) or before the chief baron of the Exchequer, if he were a man of the law, or otherwise before the justices of assize, so that one of such justices should be a judge of the King's Bench or Common Pleas, or the king's serjeant sworn.] In more modern times, however, all justices of assize were empowered on their respective circuits to try causes pending in the Court of Exchequer, without a separate commission issuing from the Exchequer for the purpose, which formerly had been considered necessary (*b*). And all the distinctions aforesaid are now wholly swept away; as under the Judicature Acts Her Majesty is empowered by commission of assize, or any other commission, either general or special, to assign to any judge or judges of the High Court of Justice, or other persons usually named in commissions of assize, the duty of trying issues either of fact or of law, or partly of both, in any cause or matter dependent in the High Court; and while engaged in the exercise of this jurisdiction, the commissioners are to be deemed to constitute a court of the High Court, and not, as formerly, to be commissioners only with certain specified powers (*c*).

Formerly, in the holy time of Lent, assizes could only [be taken by consent of the bishops at the king's request, as expressed in the statute of Westminster the first (3 Edw. I.), c. 51; and it was also usual, before the reformation in religion, for the prelates to grant annual licences to the justices of assize to administer oaths in holy times; for oaths were then deemed to be of ecclesiastical

(*b*) 2 & 3 Vict. c. 22.

(*c*) 36 & 37 Vict. c. 66, s. 29. County Court judges are, by the Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 7, and by 51 & 52 Vict. c. 43, s. 16, authorized to be included in the commission; just as queen's counsel are or were, by the 13 & 14 Vict. c. 25.

[cognizance. Moreover, the jealousy of our ancestors ordained, that no man of law should be judge of assize in his own county, wherein he was born or did inhabit (*d*); and a similar prohibition is found in the civil law (*e*), which carried this principle so far, as to make it equivalent to the crime of sacrilege for a man to be governor of the province in which he was born, or with which he had any civil connection (*f*).] But in modern times, this prohibition, always inconvenient, was deemed unnecessary, the apprehensions on which it was founded being sufficiently obviated by the high character and position of our judges; and by the statutes 12 Geo. 2, c. 27, and 49 Geo. III. c. 91, it was consequently abolished.

The judges upon their circuits (*g*) sit, therefore, under the authority of several distinct commissions granted to them and to the other persons named therein. Of these commissions, those which are applicable to civil cases are the commissions of *assize* and *nisi prius* (*h*), the commission of *assize* having reference to the real actions once in use, but now long since abolished, and the commission of *nisi prius* having reference to all other actions; and those which are applicable to criminal cases are the commissions *of the peace*, *of oyer and terminer*, *and of gaol delivery*, the

(*d*) Stat. 4 Edw. 3, c. 2; 8 Rich. 2, c. 2; 33 Hen. 8, c. 24.

(*e*) Ff. 1, 22, 23.

(*f*) C. 9, 29, 4.

(*g*) The 23rd section of the Judicature Act, 1875 (38 & 39 Vict. c. 77), enables the crown to regulate circuits by Order in Council; and such orders were accordingly issued, dated 5th February and 17th May, 1876, and 26th June, 1884, constituting the following circuits:—the Northern—the North Eastern—the Midland—the South Eastern—the Oxford—the Western, and the North and South Wales circuits. But with regard to the county of *Surrey*, that county was not to be included in any circuit, but commissions were to be issued, for the discharge of civil and criminal business therein, not less often than twice in every year; but this county has now been included in the South Eastern Circuit (see Order in Council, 28th July, 1893.) See also the Winter Assizes Act, 1876 (39 & 40 Vict. c. 57); the Winter Assizes Act, 1877 (40 & 41 Vict. c. 46); and the Spring Assizes Act, 1879 (42 & 43 Vict. c. 1).

(*h*) 3 Bl. Com. p. 60.

consideration of which latter belongs properly to the subsequent Book of these Commentaries (*i*). With regard to the commission of *nisi prius* (otherwise now called indifferently the commission of *assize*),—it is to be understood, that all questions of fact, in actions ripe for trial, used, by the antient course of practice, to be appointed to be tried at Westminster in some Easter or Michaelmas term, by a jury returned from the county wherein the cause of action arose; but with this proviso, "*unless before*" (*nisi prius*) the day prefixed, the judges of assize should come into the county in question; and as in modern times the judges invariably did so come in the vacations preceding those terms respectively, the trials always in fact took place before the judges under their commissions of *nisi prius*. But by the effect of the 15 & 16 Vict. c. 76 ("The Common Law Procedure Act, 1852"), the course of proceeding in civil causes was then made no longer even ostensibly connected with the proviso of *nisi prius* (*k*); and the trial was allowed to take place, without the use of any such words in the process of the court, and as a matter of course before the judges sent under the commission into the several counties (*l*).

Having now given some account of the palatinate courts and of the commissions of assize or of *nisi prius*, we must revert to the High Court; and regarding the High Court, we have to observe that its judges (*m*),—all of whom, with the exception of the presidents of its several divisions,

(*i*) Vide post, vol. IV. bk. VI. ch. X.

(*k*) 15 & 16 Vict. c. 76, s. 104, abolished the jury process of *distringas juratores*, in the award of which the proviso of *nisi prius* used to be inserted.

(*l*) By 3 Geo. 4, c. 10, it was enacted that the commission of the judges on circuit might be opened on the next day to the one appointed; or if that was a Sunday, or other *dies non*, then on the day following.

(*m*) 40 & 41 Vict. c. 9, s. 4. A "puisne judge" is defined as a judge of the High Court other than the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron, and *their successors* respectively (sect. 5).

have the uniform style of "Justices of the High Court," —were, on the new system coming into operation in 1875, selected from the previous equity and common law judges, together with the judge of the Court of Admiralty, the judge of the Court of Probate, and the judge ordinary of the Court for Divorce and Matrimonial Causes (*n*); and it forms one of the provisions of the Judicature Acts, that whenever the office of a judge of the High Court shall become vacant, a new judge may be appointed by patent, and that (subject to the changes effected by the Judicature Act, 1881, to be presently mentioned) all persons appointed to fill the places of the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, and their respective successors, shall continue to be appointed to the same respective offices with the same precedence and by the same respective titles and in the same manner respectively as heretofore (*o*).

Such being the constitution of the High Court of Justice, it is for the more convenient despatch of business subdivided into the following divisions,—that is to say, the Chancery Division, the Queen's Bench Division (now comprising, in addition to the original division of that name, the Common Pleas Division and the Exchequer Division), the Probate, Divorce and Admiralty Division, and the Bankruptcy Division; and we shall deal briefly with each of these divisions in its order.

I. *The Chancery Division.*—Of this Division the Lord Chancellor is president, and the other judges thereof in-

(*n*) Amongst these was, and is, included the Lord Chancellor; but by 38 & 39 Vict. c. 77, s. 3, it is declared, that the Lord Chancellor for the time being is not to be deemed a *permanent* judge of the High Court. As to the number of the judges of the court, see, also, 40 & 41 Vict. c. 9, s. 2; and 44 & 45 Vict. c. 68.

(*o*) 36 & 37 Vict. c. 66, s. 5; and see s. 32, as to future appointments.

cluded the Master of the Rolls and the Vice-Chancellors (*p*); and now include their respective successors; excepting that the Master of the Rolls, as a judge, is now a judge exclusively of the Court of Appeal (*q*); and to this Division is assigned such business (in general) as would, before the Judicature Acts came into operation, have belonged to the Court of Chancery.

II. *The Queen's Bench Division.*—Of this Division the Lord Chief Justice of England is president, and the existing other judges thereof include some of the persons who were formerly judges of the Court of Queen's Bench; and to this Division is assigned such business (in general) as would have, previously, belonged to that court. This Division has now had amalgamated with it (as before indicated) the Common Pleas Division and the Exchequer Division nextly mentioned.

III. *The Common Pleas Division.*—Of this Division the Lord Chief Justice of the Common Pleas used to be president, and the existing other judges included some of those persons who were formerly judges of the Court of Common Pleas; and to this Division was assigned such business (in general) as would before the Acts have belonged to the Court of Common Pleas at Westminster, or at Lancaster, or to the Court of Pleas at Durham.

IV. *The Exchequer Division.*—Of this Division the Lord Chief Baron of the Exchequer used to be president, and the existing other judges included some of the persons who were formerly barons of the Court of Exchequer: and

(*p*) 36 & 37 Vict. c. 66, s. 31; 44 & 45 Vict. c. 68, s. 5. By 40 & 41 Vict. c. 9, s. 2, an additional judge of the High Court was appointed; and by 44 & 45 Vict. c. 68, s. 6, the power of appointing such additional judge was perpetuated; and under sect. 18 of the 39 & 40 Vict. c. 59, a second additional judge for the Chancery Division may, *semble*, be appointed.

(*q*) 44 & 45 Vict. c. 68, s. 2.

to this Division was assigned such business (in general) as would previously have belonged to that court, either as a court of revenue or of common law.

In consequence, however, of the Judicature Act, 1881 (44 & 45 Vict. c. 68), the three last-mentioned Divisions of the High Court are now reckoned as but one Division, and are grouped together as the Queen's Bench Division simply, and the Lord Chief Justice of England has (in addition to his former powers as such) all the powers of the late Chief Justice of the Common Pleas and of the late Chief Baron of the Exchequer.

V. *The Probate, Divorce, and Admiralty Division.*—Of this Division the person who used to fill the joint offices of judge of the former Court of Probate and of judge ordinary of the former Court for Divorce and Matrimonial Causes is the existing president, and the other judge is the judge of the former Court of Admiralty, or his successor; and to this Division is assigned such business (in general) as would before the Acts have belonged to the Court of Probate, the Court for Divorce and Matrimonial Causes, and the Court of Admiralty respectively (*r*).

VI. *The Bankruptcy Division.*—Of this Division, which was for the first time created by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 93, it suffices to say that to it has been assigned all the jurisdiction of the old Court of Bankruptcy in London, with a greatly improved machinery; and that a special judge of the High Court has been assigned to it (*s*).

The above partition of the High Court of Justice does not prevent a judge of any Division from acting in any *divisional court* of the High Court of Justice, however

(*r*) 36 & 37 Vict. c. 66, ss. 31, 34. (*s*) 46 & 47 Vict. c. 52, s. 94.

composed (*t*); and though the plaintiff may, within certain limitations, choose the Division in which he will take proceedings, an order of court, transferring the same from one Division to another, may at any time be made, either with or without any application of the parties (*u*). And although, as the general rule, every action and proceeding in the High Court must, so far as practicable and convenient, be disposed of before a single judge, constituting in his own person a court of the High Court, and (so far as regards the proceedings therein subsequent to the hearing or trial) before the judge before whom such hearing or trial took place (*x*), still there are certain classes of business which must take place before a *divisional court* of the High Court, consisting, in general, of two of the judges of the High Court (*y*).

Secondly, the Court of Appeal.—The Court of this name, which was constituted by the Judicature Acts, was intended to supersede the system of appeals which was previously in force; and it will therefore be convenient to notice, firstly, the old system of appeals. Now appeals under the old system were as follows, that is to say:—In the case of most of the inferior courts of civil jurisdiction, the appeal, in a matter of law, was to the Queen's Bench exclusively, and in a matter of equity, to the Court of Chancery; while from an inferior court with *admiralty* jurisdiction, the appeal in respect thereof was to the Court of Admiralty; and from a county court having jurisdiction in bankruptcy, the appeal was to the chief judge in bankruptcy; and from the provincial *ecclesiastical* courts, the appeal was to the Privy Council. And with regard to the superior courts of common law and of equity, and in

(*t*) 36 & 37 Vict. c. 66, ss. 31, 40, 41; 39 & 40 Vict. c. 59, s. 17; 47 & 48 Vict. c. 61, s. 4.

(*u*) See 36 & 37 Vict. c. 66, s. 36; Ord. xlix. r. 1 (1883), and r. 4a (December, 1885); and 47 & 48 Vict. c. 61, s. 6.

(*x*) 53 & 54 Vict. c. 44, s. 2.

(*y*) 36 & 37 Vict. c. 66, s. 42, and 39 & 40 Vict. c. 59, s. 17.

Admiralty, the immediate appeal from these courts respectively was to the Court of Exchequer Chamber, to the Court of Appeal in Chancery, or to the Privy Council, according to the distinctions already set forth; and with regard to the chief judge in Bankruptcy, including the London Registrar in Bankruptcy, the appeal was to the Court of Appeal in Chancery; and with regard to the Chancery of the County Palatine of Lancaster, the appeal was to the Chancellor of that Duchy sitting with the Court of Appeal in Chancery (*z*); while from the Court of Appeal in Chancery and from the Court of Exchequer Chamber, an ultimate appeal lay in general to the House of Lords. But under the Judicature Acts, the whole of the old system of appeals has been altered; and now all appeals from petty or quarter sessions, from a county court, or from any other inferior court, which might previously have been brought to any court or judge whose jurisdiction is transferred to the High Court, are now to be heard and determined by a *divisional court* (*a*), whose determination is in general final (*b*); and to the Court of Appeal constituted by the Acts, and which the Acts constitute a Court of Record, is transferred all the appellate jurisdiction and powers of the Lord Chancellor and of the Court of Appeal in Chancery; of the court of appeal in chancery of the county palatine of Lancaster (*c*); of the court of the Lord Warden of the Stannaries; and of the Court of Exchequer Chamber (*d*); and under the 56 & 57 Vict. c. 37, s. 10, appeals from the Liverpool Court of Passage, are now also to this Court of Appeal (*e*); and under the 52 & 53 Vict. c. 47, appeals from the County Palatine of Durham are now also to this Court of

(*z*) 17 & 18 Vict. c. 82; and see 53 & 54 Vict. c. 23, ss. 3, 4.

(*a*) 47 & 48 Vict. c. 61, s. 4; and Ord. lix. (1883), rr. 1—4.

(*b*) 36 & 37 Vict. c. 66, s. 45.

(*c*) 53 & 54 Vict. c. 23, s. 4.

(*d*) Sect. 18; Re Longdendale Cotton Spinning Co., 8 Ch. D. 153.

(*e*) Anderson *v.* Dean, (1894) 2 Q. B. 222.

Appeal, although formerly the appeal from that Palatinate Court was to the House of Lords direct. Of the Court of Appeal thus constituted, the Lord Chancellor is the president (*f*); and an ex-Lord Chancellor is *ex officio* a judge thereof, although not obliged to sit (*g*); and in addition to him there used to be four other *ex officio* judges, viz., the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer (*h*); but by the statute 44 & 45 Vict. c. 68, the Master of the Rolls ceased to be an *ex officio* judge, and became a permanent judge, of this court (*i*); and the president for the time being of the Probate, Divorce, and Admiralty Division was made an *ex officio* judge thereof (*k*). There are also a certain number of ordinary judges of this court (all of whom are styled "lords justices of appeal"); among whom were included the two judges who were formerly the lords justices of appeal in Chancery, and are now included their successors, together with three other judges (*l*). And to the Court of Appeal as thus established was also assigned every appeal from a divisional court of the High Court, or from any judgment or order of the High Court, or of any judge or judges thereof (*m*); but, the judges having at first interpreted this provision a little too largely, it was afterwards provided, by the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 20, that no appeal from a divisional court of the High Court should lie to the Court of Appeal where the decision of the High Court, or of its predecessor the Superior Court, was by statute declared to

(*f*) 38 & 39 Vict. c. 77, s. 6.
(*g*) 54 & 55 Vict. c. 53, s. 1.
(*h*) 38 & 39 Vict. c. 77, s. 4.
(*i*) 44 & 45 Vict. c. 68, s. 2.
(*k*) Sect. 4; 54 & 55 Vict. c. 53, s. 2.
(*l*) 39 & 40 Vict. c. 59, s. 15; 40 & 41 Vict. c. 9, s. 4.
(*m*) 36 & 37 Vict. c. 66, s. 19; Walsall Overseers *v.* L. & N. W. Rail. Co., 4 App. Ca. 30; Corporation of Peterborough *v.* Wilsthorpe Overseers, 12 Q. B. D. 1.

be final (*n*). Also, under the Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 1, motions for new trials, which used in general to be made in the first instance to a divisional court of the High Court, are now in all cases made to the Court of Appeal. And under the Judicature Act, 1894 (57 & 58 Vict. c. 16), all appeals from a judge in matters of practice and procedure are to be made to the Court of Appeal; but the number of such appealable orders is, by that Act, greatly diminished.

(*n*) 44 & 45 Vict. c. 68, s. 14; Lady Sandhurst's case, 23 Q. B. D. 79.

CHAPTER VI.

OF THE ULTIMATE COURTS OF APPEAL.

As has been mentioned in the preceding chapter, at the time immediately before the Judicature Acts came into operation, an ultimate appeal lay from the Court of Appeal in Chancery and from the Exchequer Chamber, to the House of Lords, which was the supreme court of appellate jurisdiction in the kingdom, in matters not coming before the crown itself in the Privy Council. The House of Lords appears to have succeeded to this supreme appellate jurisdiction, upon the dissolution of the *aula regia*. For as the barons of parliament were constituent members of that court, and the rest of its jurisdiction was parcelled out to the other tribunals mentioned in the preceding chapter, it followed that the right of entertaining appeals and all other jurisdiction, not so parcelled out and parted with remained in the *aula regis* as the parent court. Hence the House of Lords has been, as the general rule, a tribunal of appeal in causes of common law and of equity in the English courts, and (since the union of those countries respectively) in those in the courts of Scotland or of Ireland; and it has also been in such causes the last resort, from whose judgment no further appeal has been permitted,—[the law reposing an entire confidence in the honour and conscience of the noble persons who compose this important assembly, that (if possible) they would make themselves masters of those questions upon which they undertook to decide; and in all dubious cases would

[refer themselves to the opinions of the judges who were summoned to advise them: since upon their decision all property must finally depend.]

Notwithstanding these considerations, it was the intention of the framers of the Judicature Act, 1873, to deprive the House of Lords of the larger portion of this time-honoured jurisdiction; and though the Act just mentioned refrained from interfering with the power of the House of Lords to deal with the judgments of the Scotch and Irish courts, it provided that no error or appeal should be brought from any judgment or order of the High Court of Justice or of the Court of Appeal in England (*a*). However, owing to various causes, the Judicature Act of 1873 did not come into operation at the time originally intended, viz., 1st November, 1874, and meanwhile a change took place in public opinion on this matter; and by the Judicature Act, 1875 (38 & 39 Vict. c. 77), the provision in question was suspended for a time; and by the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), the provision was repealed altogether.

An appeal to the Judicial Committee of the Privy Council lay (as has also been mentioned in the preceding chapter), not only in matters of admiralty and lunacy, but also from the ecclesiastical courts and from the courts of the colonies. Now regarding these appeals also, it was the intention of the framers of the Judicature Act that the functions of the Judicial Committee in connection therewith, should also be transferred to the Court of Appeal thereby established; and that Act contained a provision to the effect, that the crown might by order in council direct that all appeals and petitions to her Majesty, which, according to the law then in force, ought to be heard before the Judicial Committee, should be referred for hearing to, and be heard by, the Court of Appeal (*b*). But here, too, a similar change took place in public opinion, and it was

(*a*) 36 & 37 Vict. c. 66, s. 20. (*b*) Ibid. s. 21.

felt that the proper course to take would be, not to destroy the jurisdiction, but to endeavour to improve its procedure; and accordingly the provision in question was (like that relating to the House of Lords) first suspended, and then repealed together.

The Appellate Jurisdiction Act, 1876, to which we have just referred, contains provisions designed to improve the constitution, and also the procedure, of the House of Lords and of the Judicial Committee, so far as regards the jurisdiction of each in civil matters; and of these a short account shall here be given.

I. *As to the House of Lords.*—It is expressly provided by the Act last named (*c*), that an appeal shall lie to the House of Lords from any order or judgment either of the Court of Appeal in England or of any of the Scotch or Irish Courts, from which error or an appeal lay thereto at or immediately before the commencement of the Act, that is to say, 1st November, 1876; and that such appeal shall be brought by way of *petition*, praying that the matter of the order or judgment appealed against may be reviewed before her Majesty the Queen in her Court of Parliament, in order that the said court may determine "what of right, and according to the custom of this realm, ought to be done in the subject-matter thereof" (*d*); and that an appeal shall not be heard and determined unless there be present not less than three "Lords of Appeal," that is to say, three of the following persons:—the Lord Chancellor, the Lords of appeal in ordinary (presently to be mentioned), and such peers as have held "high judicial office,"—viz., the office of Lord Chancellor of Great Britain or Ireland, or of paid judge of the Judicial Committee, or of judge of the High Court of Justice, or of the Court of Appeal, or of the superior courts of law and equity in England as they existed before the constitution of the High Court of

(*c*) 39 & 40 Vict. c. 59, s. 3. (*d*) Sect. 4.

Justice, or of one of the superior courts of law and equity at Dublin, or of the Court of Session in Scotland (*e*). And with regard to the "lords of appeal in ordinary," it is enacted that in order to aid the House of Lords in the hearing and determination of such appeals, her Majesty may appoint by patent two qualified persons (*f*), who shall hold office during good behaviour and notwithstanding the demise of the Crown, but who shall be removable on the address of both Houses of Parliament; and each of such lords of appeal is entitled during life to rank as a baron; and, while he continues in office, and even after his retirement or resignation (*g*), to a writ of summons to attend and to sit and vote in the House of Lords; but his dignity is not hereditary (*h*). And for the purpose of hearing appeals, and to prevent delay in the administration of justice, it is further provided, that the House of Lords may sit as a court of appeal during the prorogation of parliament, and even during the dissolution of parliament, should her Majesty think fit, by writing under her sign manual, to authorize the lords of appeal to hold sittings during such dissolution (*i*). The Act also substitutes the proceeding by way of appeal for the proceeding by way of error, which last it wholly abolishes (*k*); and the period of one year (instead of five years as formerly) is the time limited for bringing an appeal; and the House may now, in a proper case, call in *assessors* (*l*).

(*e*) 39 & 40 Vict. c. 59, ss. 5, 25.

(*f*) The qualification consists in having held "high judicial office" for not less than two years, such office being as defined in sect. 25 of the Appellate Jurisdiction Act, 1875, as amended by sect. 5 of the Appellate Jurisdiction Act, 1887; or having been for not less than fifteen years a practising barrister in England or Ireland, or a practising advocate in Scotland. (Sect. 6.)

(*g*) 50 & 51 Vict. c. 70, s. 2.

(*h*) Sect. 6.

(*i*) Sects. 8, 9.

(*k*) Standing Orders have been issued by the House of Lords, regulating the practice on appeals under this Act.

(*l*) 54 & 55 Vict. c. 53, s. 3.

II. *As to the Judicial Committee.*—It will be remembered, that, by a statute passed in 1871 (34 & 35 Vict. c. 91), her Majesty was enabled to appoint four judges as paid members of the judicial committee (*m*), whose appointment and tenure of office were the same as those just mentioned with regard to the lords of appeal in ordinary. The Appellate Jurisdiction Act of 1876 provides for the gradual substitution of additional lords of appeal in ordinary for these paid members of the judicial committee; and directs that, subject to the due performance of his duties with regard to appeals in the House of Lords, it shall be the duty of a lord of appeal in ordinary, if a privy councillor, to sit and act also as a member of the judicial committee (*n*). And the same Act also provides, that her Majesty by order in council, with the advice of the judicial committee or any five of them (the Lord Chancellor being one), and of the archbishops and bishops who are members of the privy council (or any two of them), may make rules for the attendance, as *assessors* of the committee on the hearing of ecclesiastical cases, of such number of the archbishops and bishops of the Church of England as may, by such rules, be determined (*o*).

(*m*) Vide sup. vol. II. p. 454.
(*n*) 39 & 40 Vict. c. 59, ss. 6, 14.
(*o*) Sect. 14.

CHAPTER VII.

OF THE DIFFERENT SPECIES OF CIVIL INJURIES AND OF THE REMEDIES THEREFOR,—AND HEREIN OF THE REMEDY BY ACTION GENERALLY.

We shall now proceed to the examination of the different species of civil injuries and of the remedies for redressing same; and here we may make this general remark, that either in some inferior court or in the High Court of Justice, every possible injury that can exist in contemplation of our laws is capable of being redressed,—it being a settled principle in the law, that every wrong must have a remedy (*a*); and in our consideration of the remedies for civil injuries, we shall first confine ourselves to wrongs as between subject and subject, reserving for subsequent consideration the injuries which may occur between the crown and the subject, and the remedy for which is generally of a peculiar and eccentrical nature.

The remedy by action may be in the Queen's Bench Division of the High Court, and is then commonly called a common law action; or it may be in the Chancery Division, or in some other Division of the High Court, in which case the action (formerly called a suit) is now commonly called a Chancery action, or a Probate, Divorce, or Admiralty action,—the nature of all these actions differing in many most material respects; *e. g.*, a common

(*a*) 3 Bl. Com. p. 23.

law action differs most materially from "an action of foreclosure," or "of partition," and the like; and it is necessary, or at least convenient, to treat of all these actions separately; and we shall commence with the common law action, otherwise called a legal action,—this having been the first (and being still the most usual) action for the redress of a civil wrong. And here we will observe, once for all, and in order to obviate repetition, that though under the Judicature Acts, many of the distinctions about to be explained, with reference to the forms of legal actions, have for the most part little reference to the proceedings which now take place in an action, yet these distinctions still exist, and information as to them is still desirable; for not only would many of the cases in the older reports be rendered useless to the student who was left entirely ignorant of them, but the very language of the judges in administering the existing law would often be unintelligible to him, since it is supposed to be addressed to those who are more or less acquainted with these distinctions; and certain consequences still result from them (*b*).

[Since all wrong may be considered as merely a privation of right, the plain natural remedy for every species of wrong is the being put in possession of that right whereof the party injured is deprived. This may either be effected by the specific delivery or restoration of the subject-matter in dispute to the legal owner,—as in the case of lands or personal chattels unjustly withheld or invaded: or where that is not a possible, or at least not an adequate, remedy, by making the sufferer a pecuniary satisfaction in damages,—as in case of assault, or breach of contract: to which damages the party injured has acquired an incomplete or inchoate right the instant he receives the injury, though such right be not fully ascertained till the damages are assessed by the intervention of the law. The

(*b*) Bryant *v.* Herbert, 3 C. P. D. 389.

[instruments whereby this remedy is obtained by the aid of a court, are a diversity of *actions*, which are defined by the Mirrour to be "the lawful demand of one's right" (*c*), or as Bracton and Fleta express it, in the words of Justinian, *jus prosequendi in judicio quod alicui debetur* (*d*).

The Romans introduced pretty early set forms for actions and suits in their law; and they made it a rule, that each injury should be redressed by its proper remedy only,—"*Actiones compositæ sunt, quibus inter se homines disceptarent; quas actiones, ne populus prout vellet institueret, certas solennesque esse voluerunt*" (*e*). The forms of these actions were originally preserved in the books of the Pontifical College as choice and inestimable secrets, till one Cneius Flavius, the secretary of Appius Claudius, published them to the people (*f*). And the establishment of some *formulæ* was undoubtedly useful, to define the cases in which the law considered a wrong to have been sustained, and to ascertain the nature of the remedy which it allowed, and so to prevent the uncertainty that would otherwise have attended the right of action; or, as Cicero expresses it, "*sunt jura, sunt formulæ, de omnibus rebus constitutæ, ne quis aut in genere injuriæ, aut in ratione actionis, errare possit*" (*g*); and so, with us also in England, actions have been from time immemorial conceived in more or less fixed *forms* of complaint, each form being appropriate to the particular kind of injury for which the redress is demanded (*h*).]

And in the first place, actions, according to an antient division, were either *personal*, *real*, or *mixed*. *Personal* actions were and are those whereby a man claimed and claims the specific recovery of a debt or of a personal chattel, or else satisfaction in damages for some injury

(*c*) Ch. 2, s. 1.
(*d*) Inst. 4, 6.
(*e*) Ff. 1, 2. 2, s. 6.
(*f*) Cic. pro Muræna, s. 11; De Orat. l. i. c. 41.
(*g*) Pro Q. Roscio, s. 8.
(*h*) Glanville, passim; Bract. lib. 5, De Exceptionibus, c. 17, s. 2.

done to his person or property (*i*). On the other hand, *real* actions,—or, as they are called in the Mirrour, *feudal* actions,—concerned real property only, and were actions whereby the plaintiff (*scil.* demandant) claimed the specific recovery of lands, tenements, or hereditaments (*k*) ; and it was by these actions formerly that all disputes concerning real estates were decided; but in modern times they gradually became less frequent in practice, upon account of the great nicety required in their management and the inconvenient length of their process; and a much more expeditious method of trying titles was at a later period introduced, particularly the action of ejectment, of which we shall have occasion presently to speak; and by 3 & 4 Will. IV. c. 27, s. 36, real actions were at length expressly abolished. And, lastly, *mixed* actions were suits partaking of the natures of both real and personal actions, some real property being demanded therein, together with personal damages for the wrong sustained (*l*) ; they partook, in the main, of the character of real actions, and were often so called (*m*) ; and they were abolished at the same time as the real actions above mentioned.

On the general abolition of real and mixed actions just referred to, the following escaped destruction, viz.,—the *writ of right of dower*, *the writ of dower*, *the writ of quare impedit*, and the action of *ejectment* (*n*). The two first of these lay where the demandant claimed lands or tenements by the particular title of dower, the first having been applicable only where a woman was endowed of part of her dower, and was deprived of the residue, lying in the

(*i*) 3 Bl. Com. 117.

(*k*) Bl. Com. ubi sup. citing Mirr. c. 2, s. 6.

(*l*) 3 Bl. Com. 117.

(*m*) Co. Litt. 285 b; Roscoe, Real Actions, 1.

(*n*) Ejectment, prior to the statute 15 & 16 Vict. c. 76, (by which its form was remodelled,) was often considered as a *mixed* action (see 3 Bl. Com. 214) ; and was expressly so denominated in the stat. 3 & 4 Will. 4, c. 27 ; and yet, in its form, it was a species of the personal action of trespass. (See Fitz Ab. tit. Ejectione Firmæ, 2.)

same town, by the same tenant by whom she was endowed of part (*o*), and the second having been proper in all other cases where she was entitled to dower (*p*); and the action of *quare impedit* lay where the right to present to a benefice had been disturbed, and the object of this action was to recover the presentation; and the action of ejectment lay where lands or tenements were unlawfully withheld without any title or continuing title thereto, and the object of this action was their recovery. The action of *dower* could be brought in the Court of Common Pleas alone; and consequently (under the present system) it was assigned to the Common Pleas Division (now merged in the Queen's Bench Division) of the High Court of Justice (*q*); on the other hand, the action of *quare impedit*, at suit of the crown, might have been brought either in the Court of Common Pleas, or in the Court of Queen's Bench; and *ejectment* was always capable of being brought in any of the common law courts.

Personal actions, speaking generally, were actions founded either on *contracts* or on *torts;* torts denoting generally all wrongs independent of contract, and being often considered as of three kinds, viz.: (1) *nonfeasances*, or the omission of acts which a man was by law bound to do; (2) *misfeasances*, being the improper performance of lawful acts; or (3) *malfeasances*, being the commission of acts which were in themselves unlawful (*r*); and personal actions when founded on contract, are described as actions *ex contractu;* and those on tort, as actions *ex delicto.* And the forms of personal actions which were latterly recognized were eight, viz.: *debt*, *covenant*, *assumpsit*, *detinue*, *trespass*, *trover*, *trespass on the case*, and *replevin*,—the three first being founded on contract, and the remaining five on tort (*s*);

(*o*) Roscoe on Real Actions, 29.
(*p*) Ib. 39.
(*q*) 36 & 37 Vict. c. 66, s. 34.
(*r*) 1 Chit. Pl. 134, 1st edit.
(*s*) The above classification is for most purposes correct; but 1. As to *assumpsit*, that was only one species of *trespass on the case;* and 2. As to *detinue*, that, though founded on a *tort*,—viz., the wrong-

and although all forms of action have been abolished, and every action is now a simple action on the case, still every personal action continues to be more or less in the nature of one or other of the eight forms of action just specified; and it is accordingly desirable to treat of these eight in their order.

(1.) "Debt" lies where the object is the recovery of a certain sum of money alleged to be due from the defendant to the plaintiff; (2) "covenant," where redress in damages is sought for the breach of an agreement entered into by *deed;* and (3) "assumpsit," where damages are claimed for the breach of a promise not made by deed. On the other hand, (4) "detinue" lies where the object is to recover a personal chattel unlawfully detained; (5) "trespass," where the plaintiff claims damages for a trespass, or (as it is more fully expressed) a trespass *vi et armis* (*t*), that is, for an injury accompanied with actual force, *i. e.*, a wrongful entry upon land, or a wrongful taking and keeping of personal chattels; and (6) "trover," where the wrongful taking (if any) being waived, the plaintiff claims damages for the wrongful keeping or conversion. And here it may be remarked, that trespasses savour of a criminal offence—being always attended with some violation of the peace, real or supposed, for which in strictness of law a fine ought to be paid to the crown, as well as a private satisfaction to the party injured (*u*). (7) "Trespass on the case" was a form of action less antient than the rest, having apparently first come into use in the reign of Edward the third (*x*); and it was invented under the authority of the statute of Westminster the Second, or

ful detainer of a chattel (see Gladstone *v.* Hewitt, 1 Cr. & J. 565), was considered as for some purposes an action *on contract* (see Bryant *v.* Herbert, 3 C. P. D. 389).

(*t*) In actions of trespass, the formal words *vi et armis*, and *contra pacem*, were formerly always used in the pleadings; but this was abolished by 15 & 16 Vict. c. 76, s. 49.

(*u*) Finch, L. 198; Jenk. Cent. 158.

(*x*) Hist. of Eng. L. by Reeves, vol. iii. pp. 89, 243, 391.

In consimili casu (13 Edw. I.), c. 24, upon the analogy of the old form of trespass; and it lay in every case where damages were claimed for an injury either to the person or to property, not falling within the compass of the other forms; *e. g.*, when an act was done which in itself was an immediate injury to another's person or property, there the remedy was usually by an action of trespass; but where there was no such act done, but only a culpable omission; or where the act was not *immediately* injurious, but only by *consequence* or collaterally,—there no action of trespass would lie, but only an action on the case for the damages consequent on such omission or act (*y*); also, where the subject-matter was not corporeal and tangible, so that the idea of *force* was inapplicable, the remedy was case and not trespass, even though the injury was by act done, and its operation was direct and immediate (*z*). Lastly, (8) of "replevin," it will be sufficient for the present to remark, that it was and is an action of limited application, and was and is almost invariably confined to the object of trying the legality of a *distress* levied upon the plaintiff's personal chattels (*a*).

Actions used also to be classed as *local* and *transitory*,—the former being founded on such causes of action as necessarily refer to some particular locality, as in the case of trespasses to land; the latter on such causes of action as may take place anywhere—as in the case of trespasses to goods, batteries, and the like. Thus, real actions were always in their nature local, personal actions were for the most part transitory; and, as the general rule, local actions must formerly have been tried always in the county where the cause of action really arose, and by a jury of that

(*y*) Scott *v.* Shepherd, 2 Bl. Rep. 892; Gilbertson *v.* Richardson, 5 C. B. 502.

(*z*) 1 Chitty, Pl. 143, cites Com. Dig. Action, Case, Disturbance, (A. 2).

(*a*) It lies, however, in other cases also of goods unlawfully taken. (George *v.* Chambers, 11 Mee. & W. 149; Mellor *v.* Leather, 1 Ell. & Bl. 619.)

county, while transitory actions might be tried in any county, at the discretion (in general) of the plaintiff. And it followed, that in respect of a trespass on land out of the jurisdiction, no action would lie in an English court; but where the action was transitory (as in the case of a contract wherever made), such action would lie in the English courts, whether the breach were committed in England or elsewhere. But the distinction between actions as local or transitory has been abolished under the procedure introduced by the Judicature Acts; only, the fact that an action is of the old local class is some ground for an application to change the venue, if the defendant should desire it (*b*).

Actions may be brought either for the specific recovery of property, or for damages. And as regards an action for damages, this is to be observed, viz., that it will in general lie wherever a right has been invaded—or, in other words, an injury committed,—although no damage has been actually sustained,—it being material to the establishment and preservation of the right itself, that its invasion shall not pass with impunity (*c*). Thus, an action by one commoner against another, for surcharging the common, (that is, turning on more cattle than he is entitled to do,) is maintainable, although the plaintiff may not himself have turned on any cattle of his own during the same year, and can therefore have sustained no actual loss (*d*); and in such cases, there being no ground for awarding damages (save in vindication of the right), the plaintiff recovers some trifling sum by way of *nominal* damages, in addition

(*b*) There is now "no local venue "for the trial of any action; but "when the plaintiff proposes to "have the action tried elsewhere "than in Middlesex, he shall name "the place he proposes in his "statement of claim, and unless "a judge otherwise orders it shall "be there tried; and if no place "be named, it shall be tried in "Middlesex." (Ord. xxxvi. (1883) r. 1.)

(*c*) 1 Saund. by Wms. 346 b.

(*d*) Wells *v.* Watling, 2 Bl. Rep. 1233; Marzetti *v.* Williams, 1 B. & Adol. 426; Blofeld *v.* Payne, 4 B. & Adol. 410; Rogers *v.* Whiteley, 23 Q. B. D. 236.

to which, the defendant has in general to pay the plaintiff's costs of the action, in addition to those incurred by himself. But it is, in general, requisite, to sustain an action for damages, that the plaintiff shall have sustained some loss or inconvenience, whether actual or nominal, of a kind proper and peculiar to himself. Therefore, on the one hand, where the damage is of a merely public character, and affects the subjects of the realm at large equally with the plaintiff, no civil action lies in general; but the law considers the injury in that case as amounting to a crime, and consequently as a fit subject for an indictment; *e.g.*, no action can in general be maintained for an encroachment on the highway, but the offender is liable to be indicted, as for a public misdemeanor. On the other hand, where extraordinary (*scil.* special) damage is sustained by an individual, he may have a right of action in regard to the civil injury, though the case may in its circumstances also amount to a crime; *e.g.*, in the case last supposed, if by means of a ditch dug across a public way, which is a common nuisance and the subject of an indictment, a man or his horse suffers any injury by falling therein, then for this particular damage, which is not common to others of the lieges, the party shall have his action (*e*); and in these cases the occurrence of the damage is portion of the very ground of the action (*f*). And so in the case of unlawful violence, designedly done to the person, though that always amounts, in contemplation of law, to a crime, yet the party injured is entitled to his civil remedy; but this distinction is to be observed, that in case the crime committed amounts to a felony, the remedy for the private injury is *suspended* until the sufferer has fulfilled his duty to the public, by prosecuting the offender for the public crime; though in the case of a mere misdemeanor,—such as an assault,

(*e*) 3 Bl. Com. 220; Wilks *v.* Hungerford Market, 2 Bing. N. C. 281.

(*f*) Backhouse *v.* Bonomi, 9 Ho. Ld. Ca. 503; Darley Main Co. *v.* Mitchell, 11 App. Ca. 127.

battery, libel, and the like,—the civil remedy by action is immediately available (*g*), and is in general the alternative of the criminal proceeding.

And it is to be particularly observed, that though an action will lie for an injury unattended with actual damage (*injuria sine damno*), yet none can be maintained even for loss or damage actually inflicted, unless it result from an injury,—that is, from some invasion of a right, or from some breach of duty,—a mere *damnum absque injuriâ* not being actionable; *e.g.*, if I have a mill, and my neighbour builds another mill upon his own ground, *per quod* the profit of my mill is diminished, yet no action lies against him; for every one may lawfully erect a mill on his own ground; but if I have a mill by prescription on my own land, and another erects a new mill, which draws away some portion of the stream from mine, so as to diminish its former power, an action for damages will lie against him, for in such a case there is an invasion of my prescriptive right, and not damage merely (*h*). And in some few cases, but which are of a very special nature, the same injury (being regarded in a twofold character) may be the ground of two distinct actions, the damages recovered in each being cumulative (*i*).

It ought also to be remarked, that a plaintiff is not entitled to recover in respect of any damage that is too *remote;* in other words, the damage, in order to be recoverable (*k*), must flow naturally and directly from the injury

(*g*) Crosby *v.* Leng, 12 East, 409; White *v.* Spettigue, 13 Mee. & W. 303; Wells *v.* Abrahams, Law Rep., 7 Q. B. 554; Osborn *v.* Gillett, ib. 8 Exch. 88; Ex parte Turquand, In re Shepherd, 9 Ch. D. 704.

(*h*) Bac. Ab. Actions on the Case (C).

(*i*) Brunsden *v.* Humphrey, 14 Q. B. D. 141.

(*k*) Com. Dig. Action on Case, Defamation; Bowen *v.* Hall, 6 Q. B. D. 333; Hadley *v.* Baxendale, 9 Exch. 341; Horne *v.* Midland Rail. Co., Law Rep., 8 C. P. 131; Thol *v.* Henderson, 8 Q. B. D. 457; Caledonian Rail. Co. *v.* Walker's Trustees, 7 App. Ca. 259; Grébert-Borguis *v.* Nugent, 15 Q. B. D. 85; The Notting Hill, 9 Prob. Div. 105.

committed. Therefore, where the plaintiff, who as director of musical performances had engaged a certain public singer, brought an action for the publication of a libel on her, alleging that she was thereby deterred from performing in public through the apprehension of being ill-received, so that the plaintiff lost the profits he would otherwise have gained,—it was held that the damage was too remote, and the action not maintainable (*l*).

Again, as to actions of every class, the right to sue thereon may be transferred, and that either by operation of law, or (in certain cases) by an assignment thereof by act of the parties (*m*). Thus the rights of action of a bankrupt pass (with certain exceptions) to the trustee; and upon the death of either of the parties between whom a cause of action founded on contract has arisen, the right of maintaining such action survives, in general, to or against his executors or administrators (*n*); and to these, as well as to the bankruptcy trustee, the right also belongs of *continuing* actions, which the deceased, or the bankrupt, has commenced (*o*). In respect, indeed, of actions which are founded on certain violations of personal rights,—as in the case, for example, of an action for slander,—the maxim is, that they *die with the person* (*p*); and this originally extended to every case of *tort* as distinguished from contract (*q*). But (except with reference to causes of action for the violation of personal rights, such as an assault, slander, and the like,) this antient rule has been now set aside by various Acts of Parliament. For by 4 Edw. III. c. 7, actions may be

(*l*) Ashley *v.* Harrison, 1 Esp. 48; Kelly *v.* Partington, 5 B. & Adol. 645; Knight *v.* Gibbs, 1 Ad. & El. 43; Green *v.* Button, 1 Tyr. & G. 118; Langridge *v.* Levy, 4 Mee. & W. 337; Chamberlain *v.* Boyd, 11 Q. B. D. 407.

(*m*) 36 & 37 Vict. c. 66, s. 25, sub-s. (6).

(*n*) Stubbs *v.* Holywell, Law Rep., 2 Exch. 311; Bradshaw *v.* Lancashire and Yorkshire Railway Company, ib. 10 C. P. 189.

(*o*) 15 & 16 Vict. c. 76, ss. 137, 138; 17 & 18 Vict. c. 125, s. 92.

(*p*) 3 Bl. Com. 302.

(*q*) 1 Chit. Pl. 56.

maintained *by* executors or administrators, for trespasses to the *personal* property of the testator or intestate; and by 3 & 4 Will. IV. c. 42, s. 2, for any injury to his *real* estate,—provided the injury, in the latter case, was committed within six calendar months before, and the action is brought within one year after, his death. And by 3 & 4 Will. IV. c. 42, actions may be maintained *against* executors or administrators, for any wrong committed by the deceased to another, in respect of the property of the latter, whether real or personal,—provided the wrong was committed within six calendar months before the death, and the action is brought within six calendar months after the executors or administrators have taken on themselves the administration (*r*). Moreover, by 9 & 10 Vict. c. 93 (commonly called Lord Campbell's Act, and which has been amended by 27 & 28 Vict. c. 95), whenever the death of a person shall be caused by such wrongful act, neglect, or default as would (if death had not ensued,) have entitled the party injured to maintain an action for damages, the wrongdoer may be sued for the benefit of the wife, husband, parent, or children of the person injured, and this although the death shall have been caused under such circumstances as amount in law to a felony; and the jury may, in such a case, give damages proportionable to the injury resulting from such death, to be divided among the parties for whose benefit the action is brought, in such shares as the verdict shall direct (*s*). Which last-mentioned action is, in general, brought by the executor or administrator of the deceased; but inasmuch as the action must be brought within twelve calendar months of the death, if there be no executor or

(*r*) Kirk *v.* Todd, 21 Ch. D. 484; Phillips *v.* Homfray, 11 App. Ca. 466.

(*s*) Duckworth *v.* Johnson, 4 H. & N. 653; Pym *v.* Great Northern Railway Company, 4 B. & Smith, 396; The Bernina, Mills *v.* Armstrong, 12 P. D. 58; 13 App. Ca. 1; Bulmer *v.* Bulmer, 25 Ch. Div. 409.

administrator, or no action be brought by him or her within six months after the death, the action may be brought by all or any of the parties to be benefited by the result. Lastly, the redress given by the Employers' Liability Act, 1880, to servants in respect of certain injuries sustained by them in their employments (*t*), is available also when the injury results in death.

(*t*) Vide sup. vol. II. pp. 239, 240.

CHAPTER VIII.

OF THE DIFFERENT SPECIES OF CIVIL INJURIES, AND THEIR REMEDIES.

HAVING now sufficiently discussed the nature of the remedy by action generally, we shall proceed to consider the application of that remedy to the various civil injuries, or deprivations or denials of rights and interferences with rights; and as rights were diversely divided (we may remember,) into personal rights, rights of property, rights in private relations, and public rights, it will be convenient to regard civil injuries according to the like divisions.

First.—*Injuries affecting Personal Rights.*

Of injuries affecting *life*, these are not merely civil wrongs; but where committed wilfully, are crimes. Regarded as civil wrongs, there are two cases in which the law provides a remedy in damages for causing death, namely:—Firstly, under Lord Campbell's Act, to which reference has just been made at the end of the preceding chapter; and secondly, under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), also there referred to, and which is more fully considered in the second volume of these Commentaries, under the relation of Master and Servant; but save in these two cases, the law does not regard the deprivation of life in the light of a civil wrong.

With regard to injuries affecting a man's *limbs* or *body*, these may be committed,—(1) By *threats* (or menaces of

bodily hurt), through fear of which a man's business is in fact interrupted,—a menace alone, without any such consequent inconvenience, making not an actionable injury (*a*); (2) By *assault*,—which is an attempt or offer to beat a man without proceeding to touch him (*b*): as if one lifts up his cane or his fist in a threatening manner at another, or strikes at him, but misses him, this is an assault, *insultus*, which Finch describes to include "all unlawful setting upon one's person" (*c*); (3) By *battery*,—which is the beating of another, the least touching of another's person, wilfully or in anger, amounting to a battery (*d*); for the law cannot draw the line between different degrees of violence, and therefore totally prohibits even the first and lowest stage of it,—every man's person being sacred, and no other having a right to meddle with it in any manner (*e*); (4) By *wounding*,—which consists in giving another some dangerous hurt, and is only an aggravated species of battery; and (5) [By *mayhem*,—which is an injury still more atrocious, and consists in violently depriving another of the use of a member proper for his defence in fight. This is a battery attended with this aggravating circumstance, that thereby the party injured is for ever disabled from making so good a defence against future external injuries, as he might otherwise have done; and among these defensive members are reckoned not only arms and legs, but a finger, an eye, and a fore-tooth (*f*), and also some others (*g*); but, it is said, that the loss of one of the jaw-teeth, the ear, or the nose, is no mayhem at common law, as they can be of no use in fighting.] For each of these injuries,—threats,

(*a*) 3 Bl. Com. p. 120, citing Finch, L. 202.

(*b*) Bl. Com. ubi sup.; Reed *v.* Coker, 13 C. B. 850.

(*c*) Finch, ubi sup.

(*d*) Bl. Com. ubi sup.; Coward Baddeley, 4 H. & N. 478.

(*e*) On a similar principle, the Cornelian law *De injuriis* prohibited *pulsation* as well as *verberation*,—distinguishing verberation, which was accompanied with pain, from pulsation, which was not so attended. (Ff. 47, 10, 5.)

(*f*) Finch, L. 204.

(*g*) 1 Hawk. P. C. 111.

assault, battery, wounding, and mayhem,—an action will lie, whereby adequate damages may be recovered; and for the four last, at least, an indictment may be brought as well as an action (*h*). It is to be observed, however, as to all these acts, that to render them either actionable or indictable, they must be committed on an unlawful occasion; for under certain circumstances they may be justifiable, and then they form no just ground of complaint either civil or criminal. Thus, assault and battery are justifiable where one who has authority, as a parent or master, gives moderate correction to his child, his scholar, or his apprentice (*i*). So also, on the principle of self-defence; for if one strikes me first I may strike in my own defence, and if sued for it, may raise the defence of *son assault demesne*, that it was the plaintiff's own original assault that occasioned it (*k*); and supposing a dangerous scuffle thereon to take place, I may even, for my own preservation (but not otherwise), wound or maim my adversary, and justify it in a similar way (*l*). So likewise, acting in defence of my goods or possessions, if a man endeavours to deprive me of them, I may justify laying hands upon him to prevent him; and in case he persists with violence, I may proceed to beat him away (*m*). Thus, too, in the exercise of an office, as that of churchwarden or beadle, a man may lay hands upon another, to turn him out of the church and prevent his disturbing the congregation; and if sued for this or the like battery, he may set forth the whole case, and state that he laid hands upon him gently, *molliter manus imposuit*, for this purpose.

(*h*) Reg. *v.* Mahon, 4 A. & E. 575. As to the punishment of an *assault* (which is implied in every case of battery, wounding, or mayhem) either by indictment or (in certain cases) by way of summary conviction, vide post, vol. IV. bk. VI. ch. IV. and ch. XI.

(*i*) Hawk. P. C. bk. i. c. 61, s. 23; Winstone *v.* Linn, 1 B. & C. 469.

(*k*) Oakes *v.* Wood, 3 Mee. & W. 150.

(*l*) Cockcroft *v.* Smith, 2 Salk. 642.

(*m*) Finch, L. 203.

And besides the more direct injuries to a man's limbs or body which have been enumerated, there is a (6th) species of injury thereto, which is indirect or consequential, resulting more particularly from *negligence* in the performance of some duty; for example, in the case where a passenger in a coach is overturned by the carelessness of the driver (*n*). Here an action for damages will lie against the coach proprietor, not only where he is guilty of the negligence in his own person, but also where the fault was that of his servant; it being a general principle applicable to all torts whatever,—that a man is liable to an action, not only for what he does in his own person, but for what he does in the person of another, who acts at the time by his authority: for "*qui facit per alium, facit per se*" (*o*). Another consequential injury to the bodies of individuals, falling under the same head, is that of damage done to the person, by a brute animal accustomed to do mischief (*p*); in which case, the owner must answer for the consequences, provided the plaintiff can prove the *scienter*, that is, can show that the owner knew of such evil habit (*q*). There may, however, be circumstances in which mischief caused by an animal, though known to be dangerous, will not support an action; as, for example, in the case of a dog, kept for the protection of its owner's house and yard, if carefully confined within the premises, and the injury be caused by the plaintiff's having entered the same im-

(*n*) Brotherton *v.* Woodrod, 3 B. & Bing. 54; Clark *v.* Chambers, 3 Q. B. D. 327; Radley *v.* London and North Western Rail. Co., 1 App. Ca. 754; The Bernina, Mills *v.* Armstrong, 13 App. Ca. 1, overruling Thorogood *v.* Bryan, 8 C. B. 115.

(*o*) Gordon *v.* Rolt, 4 Exch. 365; Sharrod *v.* London and North Western Rail. Co., ib. 580; Elliott *v.* Hall, 15 Q. B. D. 315.

(*p*) May *v.* Burdett, 9 Q. B. 101; Cox *v.* Burbidge, 13 C. B. (N. S.) 430; Worth *v.* Gilling, Law Rep., 2 C. P. 1.

(*q*) May *v.* Burdett, ubi sup.; Baldwin *v.* Casella, Law Rep., 7 Exch. 325. As to the detention and destruction (under a "*rabies order*") of stray dogs, see 34 & 35 Vict. c. 56; and the Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 3.

properly, or without sufficient caution (*r*). With respect, however, to the liability of the owners of dogs, it has been rendered more onerous than formerly by statute, it being now provided, that if an action be brought for any injury by a dog to *cattle or sheep*, it shall not be necessary for the plaintiff to show either a previous mischievous propensity in the dog or any knowledge (i. e., *scienter*) by the owner of such propensity, or even that the injury complained of was attributable to neglect on the part of such owner (*s*); and the word *cattle* in the statute referred to has been interpreted to include horses and mares (*t*).

Injuries affecting a man's *health* are, where, by any unwholesome practices of another, a man sustains any damage in his vigour or constitution. As by selling him bad provisions or wine (*u*); by the exercise of a noisome trade, which infects the air in his neighbourhood (*x*); or by the neglect or unskilful management of the surgeon, or apothecary, who attends him (*y*). For *mala praxis*, whether it be for curiosity and experiment, or by neglect, is a grave offence at common law; because it breaks the trust which the party had placed in his physician, and tends to the patient's destruction (*z*). These are wrongs or injuries for which there is a remedy by action to recover damages; and in case of gross misconduct, the party may in some cases also be indicted (*a*).

And we may, without impropriety, classify under this

(*r*) Bates *v.* Crosbie, M. T. 1798, in the King's Bench, cited in Christian's Black. vol. iii. p. 154.

(*s*) 28 & 29 Vict. c. 60.

(*t*) Wright *v.* Pearson, Law Rep., 4 Q. B. 582.

(*u*) 1 Rol. Abr. 90; R. *v.* Southerton, 6 East, 133; George *v.* Skivington, Law Rep., 5 Exch. 1.

(*x*) 9 Rep. 58; Hutt. 135; R. *v.* Dewsnap, 16 East, 194.

(*y*) Dr. Groenvelt's case, 1 Ld. Raym. 214; Seare *v.* Prentice, 8 East, 348; Slater *v.* Baker, 2 Wils. 359; Hancks *v.* Hooper, 7 Car. & P. 81; Lanphier *v.* Phipos, 8 Car. & P. 475.

(*z*) 3 Bl. Com. 122; 1 Ld. Raym. 214.

(*a*) R. *v.* Long, 4 Car. & P. 398; ib. 407, n. (*a*).

heading, of injuries to health, the injury commonly known as the "*subtraction*" by either spouse of those conjugal rights which he or she owes to the other; and for which injury, the Ecclesiastical Court provided a remedy by compelling the parties to live together, the suit for that purpose being called the suit for the restitution of conjugal rights (*b*). And this suit afterwards lay in the Divorce Court, which succeeded to the former ecclesiastical jurisdiction in this particular (*c*); and it now lies, of course, in the Divorce Division of the High Court; but that Court may now, in a proper case, and under the 47 & 48 Vict. c. 68, make a pecuniary provision for the injured party, in lieu of specifically enforcing the resumption of the conjugal relation (*d*).

Injuries affecting a man's *reputation* or good name are,—Firstly, by speaking respecting him malicious and defamatory words. And as to this injury, we may in the first place remark, that though malice is a necessary ingredient, yet where the words spoken are in a legal sense "defamatory," and it does not appear that they were used on any such lawful occasion as to rebut the supposition of malice, the law will always conclude them to be malicious. [The principal cases in which words will be considered defamatory, so as to amount to the legal injury of which we now speak, are as follows: viz., where a man utters anything of another which may either endanger him in law, by impeaching him of some punishable crime,—as to say that he hath poisoned another, or is perjured (*e*); or which may exclude him from society,—as to charge him with having an infectious disorder (*e. g.*, the leprosy) tending so to exclude him (*f*); or which may impair or hurt his

(*b*) Yelverton *v.* Yelverton, 1 Sw. & Trist. 574.

(*c*) Weldon *v.* Weldon, 9 P. D. 52.

(*d*) Weldon *v.* Weldon, 10 P. D. 72.

(*e*) Finch's Law, 185; Huckle *v.* Reynolds, 7 C. B. (N. S.) 114.

(*f*) Com. Dig. Act. Def. (D. 28); Bloodworth *v.* Gray, 7 Man. & G. 334.

[trade or livelihood (*e*),—as to call a tradesman a bankrupt, a physician a quack, or a lawyer a knave; or which may disparage him in an office of public trust,—as to say of a magistrate that he is partial and corrupt (*f*); and this injury is esteemed all the more heinous, the higher the officer whose reputation is attacked, and when spoken of a peer, a judge of the Supreme Court, or other great officer of the realm, it was *scandalum magnatum* (*g*). It is further to be observed, that for scandalous words of the several species before mentioned, an action may be had, without proving any particular damage to have happened, but merely upon the probability that it might happen (*h*);] but with regard to disparaging words that do not thus apparently, and upon the face of them, import such defamation as will of course be injurious, though these also may amount to the injury now under consideration, it is necessary that the plaintiff should aver (and prove) some particular damage to have happened, which is called laying his action with a *per quod* (*i*). As if I say of a commission agent, that he is an unprincipled man, and borrows money without repaying it, this is not in itself actionable; but if I say this to a person who was going to deal with him, and he forbears to do so in consequence of its being said,—here, there being special damage, an action will lie against me (*k*). So if I impute heresy or adultery to another, if he can show that he was thereby

(*e*) Jones *v.* Littler, 7 Mee. & W. 423; Bellamy *v.* Burch, 16 Mee. & W. 590; Southee *v.* Denny, 1 Exch. 196; Evans *v.* Harries, 1 H. & N. 251; Brown *v.* Smith, 13 C. B. 596.

(*f*) 3 Bl. Com. 123; Com. Dig. Act. Def. (D. 28); 2 Cro. 90; Ashton *v.* Blagrave, Ld. Raym. 1369.

(*g*) 3 Edw. 1, c. 34; 2 Rich. 2, st. 1, c. 5; 12 Rich. 2, c. 11; King *v.* Sir E. Lake, 2 Vent. 28; 3 Bl. Com. 123.

(*h*) Foulger *v.* Newcomb, Law Rep., 2 Exch. 327; Miller *v.* Davie, ib. 9 C. P. 118.

(*i*) Hopwood *v.* Thorn, 8 C. B. 293; Barnett *v.* Allen, 3 H. & N. 376; Chamberlain *v.* Boyd, 11 Q. B. D. 407.

(*k*) Storey *v.* Challands, 8 Car. & P. 234; The Western Counties Manure Co. *v.* The Lawes Chemical Manure Co., Law Rep., 9 Exch. 218.

exposed to some temporal damage, he may sue me at law and recover damages for such injury (*l*). And the case used to be the same, if I imputed unchastity to a woman, and she could show that she had thereby lost a marriage or some pecuniary advantage (*m*); but to impute unchastity to any female is now a ground of action, without any proof of special damage,—the 54 & 55 Vict. c. 51, having, in this particular, now made general what was formerly but a custom in particular places, *e.g.*, within the city of London (*n*) and the city of Bristol (*o*). Also, if I slander another man's *title*, by spreading (not in the *bonâ fide* assertion of my own rights) such injurious reports as, if true, would deprive him of his estate—as to call the issue in tail, or one who hath land by descent, a bastard,—it is actionable, provided any special damage accrue to the proprietor thereby; as if he lose an opportunity of selling the land (*p*).

It is, however, to be understood, that even where special damage has been sustained in consequence of words spoken with respect to person or property, yet if the words are not in themselves disparaging, it is *damnum absque injuriâ*, and no action can be maintained upon them (*q*). Also, where disparaging words are spoken of a kind which would otherwise be actionable in themselves, or which would be actionable because attended with special damage,—yet if they be spoken in a friendly manner, as by way of advice, admonition, or concern, without any tincture or circumstance of ill-will, they will not sustain an action; for in such

(*l*) Parret *v.* Carpenter, Noy, 64; 3 Bl. Com. 125; Gallwey *v.* Marshall, 9 Exch. 294.

(*m*) Com. Dig. Act. Def. (D. 30); Lynch *v.* Knight, 7 H. of L. Cas. 577; Parkins *v.* Scott, 1 H. & C. 153; Wilby *v.* Elston, 8 C. B 142; Davis and wife *v.* Solomon, Law Rep., 7 Q. B. 112.

(*n*) Com. Dig. ubi sup. F. 20; Pulling's Laws of London, 186.

(*o*) Power *v.* Shaw, 1 Wils. 62.

(*p*) Smith *v.* Spooner, 3 Taunt. 246; Day *v.* Brownrigg, 10 Ch. D. 294; Halsey *v.* Brotherhood, 15 Ch. Div. 514; 19 Ch. Div. 386; also sect. 32, Patents, &c. Act, 1883.

(*q*) Kelly *v.* Partington, 5 B. & Ad. 645.

case, they are not *maliciously* spoken, which is part of the definition of the injury in question (*r*).

In like manner, all such statements are *primâ facie* protected, as it is usual to comprehend under the name of *privileged* communications (*s*),—viz. those derogatory indeed to the private character of another, but uttered on such lawful occasions as tend to rebut the *primâ facie* inference of malice, which would otherwise arise from their being made; as where a man communicates to another circumstances which it is right that he should know in relation to a matter in which they have a mutual interest, but tending to the disparagement of a third person; or where a man, on being asked as to the character of one who has left his service, charges him with theft; for in such cases as these no action lies, unless some proof of malice beyond the mere utterance be given, as that they were false to the knowledge of the defendant, at the time when he made the statement (*t*). Also, the public acts of official persons, when open to comment, may be lawfully commented on, in a fair and judicious manner (*u*); and in general all proceedings in a public court of justice (*x*), or at a public meeting (*y*), may be lawfully published; as may also parliamentary reports (*z*); and no action for slander will lie against a witness in a legal proceeding for speaking falsely

(*r*) Pater *v.* Baker, 3 C. B. 831.

(*s*) Tusan *v.* Evans, 12 A. & E. 733; Coxhead *v.* Richards, 2 C. B. 569; Blackham *v.* Pugh, ib. 611; Whiteley *v.* Adams, 15 C. B. (N. S.) 393; Clark *v.* Molyneux, 3 Q. B. D. 237; Tompson *v.* Dashwood, 11 Q. B. D. 43.

(*t*) Spill *v.* Maule, Law Rep., 4 Exch. 232. In Lord Northampton's case, 12 Rep. 134, it is laid down, that where the words spoken by the defendant are a mere repetition of what he has himself heard from another, and he names his author at the time, he is not liable to an action; but this can hardly now be considered good law. (Lewis *v.* Walker, 4 B. & Ald. 614; M'Pherson *v.* Daniels, 10 B. & C. 269; De Crespigny *v.* Wellesley, 5 Bing. 392.)

(*u*) Gathercole *v.* Miall, 15 Mee. & W. 319.

(*x*) Lewis *v.* Levy, 1 Ell. Bl. & Ell. 537; Hoare *v.* Silverlock, 9 C. B. 20; Usill *v.* Hales, 3 C. P. D. 319.

(*y*) Davison *v.* Duncan, 7 Ell. & Bl. 229; Davis *v.* Duncan, Law Rep., 9 C. P. 396.

(*z*) Wason *v.* Walter, Law Rep., 4 Q. B. 73; Dawkins *v.* Paulet, Law Rep., 5 Q. B. 94.

and maliciously (*a*),—an indictment for perjury, or else an action for the penalty provided by the 5 Eliz. c. 9, being the only remedy in such a case (*b*). But the law is very solicitous for the protection of witnesses, as well in courts of justice, as also upon inquiries before commissioners (*c*).

Moreover, in all cases of actions for this injury to the reputation, if the defendant can prove the words spoken to be *true*, the action will be barred; and this whether they were or were not in law defamatory, or whether special damage ensued or not, or whether they were spoken on a privileged occasion or not; for the action being only for damages, the law esteems the truth a bar to the recovery of damages; and hence if I can prove the tradesman a bankrupt, the physician a quack, and the lawyer a knave, this will destroy their respective actions (*d*). And here we may, without impropriety, refer to that peculiar species of injury to the reputation which arises from a man (or, as more usually happens, a woman) going about and boasting or giving out that he (or she) is married to the plaintiff; which injury was cognizable in the ecclesiastical court, and the judgment of that court was to put the defendant to perpetual silence (*e*), whereby the reputation of matrimony was prevented from arising; and this injury would now be relievable, in like manner, in the Divorce Court, or Divorce Division of the High Court.

A second way of affecting a man's reputation is by publishing a *libel* upon him (*f*): which may be by writing, picture, or the like, of a malicious and defamatory character. The nature of this injury is in general similar to that of slander; and the remedy is the same in each; and

(*a*) Seaman *v.* Nethercliff, 1 C. P. D. 540; 2 C. P. D. 53.

(*b*) Revis *v.* Smith, 18 C. B. 126.

(*c*) 55 & 56 Vict. c. 64.

(*d*) 3 Bl. Com. 125. A similar rule prevailed in the civil law: "*cum qui nocentem infamat, non est æquum et bonum ob eam rem condemnari; delicta enim nocentium nota esse oportet et expedit.*" (Ff. 47, 10, 18.)

(*e*) Lord Hawke *v.* Corri, 2 Hagg. 220.

(*f*) Tidman *v.* Ainslie, 10 Exch. 63; The Queen *v.* Holbrook, 3 Q. B. D. 60.

the proper function of the judge in libel (as in slander) is to define to the jury what a libel is in point of law, and then to leave it to the jury to say whether the publication in question is a libel or not (*g*). But there are some material differences between the two. For not only such imputations as will support an action for words spoken,—but all contumelious matter that tends to degrade a man in the opinion of his neighbours, or to make him ridiculous, will amount, when conveyed in writing, or by picture, or the like, to libel (*h*); and the gist or venom of the libel may be in the *innuendo* (*i*). Again, while oral defamation is ground for an action only, there are, in the case of a published libel, two remedies—one by indictment, (or sometimes by criminal information,) and the other by action,—the former for the *public* offence, (for every libel has a tendency to provoke a breach of the peace,) and the latter for the *private* injury to compensate in damages the person who has been libelled. And formerly the rule was, that, on an indictment or criminal information, the defendant was not allowed to allege the truth of the libel by way of justification: for even if true, it tended nevertheless to a breach of the peace (*k*); but in an action for damages, the defendant might and may, (in like manner as for words *spoken*,) adopt that line of defence (*l*). And now in the case of an *indictment* or *information*, by the 6 & 7 Vict. c. 96, commonly called "Lord Campbell's Act," (as amended by 8 & 9 Vict. c. 75,) it has been provided, that, in pleading to any *indictment* or *information* for defamatory libel, the defendant may allege the truth of the matters charged;

(*g*) Parmiter *v.* Coupland, 6 Mee. & W. 105; Fox's Libel Act (32 Geo. 3, c. 60); Thomas *v.* Williams, 14 Ch. Div. 864.

(*h*) Thorley *v.* Lord Kerry, 4 Taunt. 355; Cheese *v.* Scales, 10 Mee. & W. 488; Campbell *v.* Spottiswoode, 3 B. & Smith, 769; Davis *v.* Shepstone, 11 App. Ca. 187.

(*i*) Hemmings *v.* Gasson, 1 Ell. Bl. & Ell. 346; Henty *v.* Capital and Counties Bank, 5 C. P. D. 514; 7 App. Ca. 741.

(*k*) 5 Rep. 125.

(*l*) Lake *v.* Hatton, Hob. 253; 11 Mod. 99.

and further, that it was for the public benefit that the matters charged should be published,—showing the particular fact or facts by reason whereof it was for the public benefit: but if, after such plea, the defendant shall be convicted, it shall be competent to the court, in pronouncing sentence, to consider whether the guilt of the defendant is aggravated by the plea and the evidence thereon (*m*). Lord Campbell's Act has also provided as follows:—1. In an *action* for a libel inserted in a newspaper or other periodical, it shall be competent for the defendant to plead that it was inserted without actual malice, and without gross negligence (*n*): and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in the same publication a full apology; and with such pleas, he was required also to pay money into court (*o*). 2. In all *indictments* or *informations* by a private prosecutor for the publication of a defamatory libel, if judgment be given for the defendant, he shall be entitled to costs from the prosecutor: and if, on a special plea of justification under the statute, the issue shall be found for the prosecutor, the defendant shall be liable to pay to the prosecutor the costs occasioned by such plea (*p*). 3. In every action for defamation, *whether oral or written*, it shall be lawful for the defendant (after notice in writing of his intention so to do, duly given to the plaintiff at the time of pleading), to give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff before the commencement of the action,—or as soon afterwards as he had an opportunity, in case the action had been commenced before an opportunity could be found;

(*m*) Reg. *v.* Newman, 1 Ell. & Bl. 558; Reg. *v.* Townsend, 10 Cox, C. C. p. 356.

(*n*) Chadwick *v.* Herapath, 3 C. B. 885; Lafone *v.* Smith, 3 H. & N. 735; Jones *v.* Mackie, Law Rep., 3 Exch. 1.

(*o*) 8 & 9 Vict. c. 75, s. 2; 42 & 43 Vict. c. 59; Hawkesley *v.* Bradshaw, 5 Q. B. D. 302; Fleming *v.* Dollar, 23 Q. B. D. 388.

(*p*) Tighe *v.* Cooper, 7 Ell. & Bl. 639.

and it has latterly been provided (*q*), that when the defendant does not plead the truth of the defamatory matter, he must, in order to be at liberty to give evidence in mitigation of the damages, have given the plaintiff, within seven days at least before the trial, particulars of the matters as to which he intends giving such evidence.

And before leaving this subject of libel, it may be convenient here to refer to the Newspaper Libel Act, 1881 (44 & 45 Vict. c. 60), and to the Newspaper Libel Act, 1888 (51 & 52 Vict. c. 64); by the combined effect of which two Acts, a fair and accurate report in any newspaper of any proceedings (not involving blasphemous or indecent matter) in any court (sect. 3), or of any proceedings (not involving blasphemous or indecent matter) at any public meeting (sect. 4), is declared to be privileged; but as regards the publication of the proceedings of a public meeting, the publication must not have been made maliciously; and the defendant must (if requested so to do) have published any reasonable letter or statement, in contradiction of the report, which the plaintiff may have sent to him for publication; and no obscene matter is to be set out (a mere reference thereto being sufficient) in any indictment or other judicial proceeding (sect. 7); also, actions by the same plaintiff against divers defendants for the same libel may be consolidated, and the aggregate damages assessed and distributed between the different defendants (sect. 5); or, if the plaintiff has already recovered damages for the same libel in any previous action, the fact may be given in evidence, in any subsequent action, in mitigation of damages (sect. 6).

A third way of destroying or injuring a man's reputation is by preferring a malicious indictment or prosecution against him; for under the mask of justice and public spirit, the process of the law is sometimes made the engine of private spite and enmity (*r*); and for this, accordingly,

(*q*) Ord. xxxvi. (1883), r. 37.

(*r*) Turner *v.* Ambler, 10 Q. B. 252.

an adequate remedy is afforded, by awarding damages in an action for a false and malicious prosecution; which action may be brought either against a single person or against several, with an allegation in the latter case that they conspired together for the purpose (*s*). However, any probable cause for preferring a prosecution is sufficient to justify the defendant; and in order to maintain this action, the burthen lies therefore on the plaintiff of showing that no probable cause existed (*t*); and he must also prove, either that he was acquitted upon such prosecution, or that it was in some other manner legally determined in his favour (*u*); *e.g.*, he may show, that the indictment was thrown out by the grand jury, or quashed by the court; for it is not the danger of the plaintiff, but the scandal, vexation, and expense to which he is put, upon which this action is founded (*x*). But no action for a malicious prosecution is sustainable against any public officer (*e.g.*, a magistrate) in respect of a judicial act; and the issue of a search warrant under the Criminal Law Amendment Act, 1885, for the rescue of young females, has been held to be a judicial act within the meaning of this exemption (*y*); also, public officers generally are, by the 56 & 57 Vict. c. 61, protected against vexatious actions instituted against them, for alleged errors committed by them in the execution of their public duties.

The right of personal *liberty* may be invaded by the injury of false imprisonment (*z*): and to constitute this

(*s*) 1 Saund. by Williams, 229 a.

(*t*) Johnstone *v.* Sutton, 1 T. R. 549; Musgrove *v.* Newell, 1 Mee. & W. 582; Michell *v.* Williams, 11 Mee. & W. 205; Metropolitan Bank *v.* Pooley, 10 App. Ca. 210; Abrath *v.* North East. Rail. Co., 11 App. Ca. 247.

(*u*) Morgan *v.* Hughes, 2 T. R. 225; Willes, 520, n.; Whitworth *v.* Hall, 2 B. & Adol. 695.

(*x*) Jones *v.* Gwynn, 10 Mod. 19, 220; Chambers *v.* Robinson, Str. 691.

(*y*) Hope *v.* Evered, 17 Q. B. D. 338.

(*z*) Edgell *v.* Francis, 1 Man. & Gr. 222; Glynn *v.* Houstoun, 2 Man. & Gr. 337; Jones *v.* Gurdon, 2 Gale & D. 133; Smith *v.* Eggington, 7 Ad. & El. 167; Mitchell *v.*

injury, [there are two points requisite :—1. The detention of the person; and 2. The unlawfulness of such detention. Now every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house; or even by forcibly detaining one in the street (*a*). Unlawful, or false, imprisonment consists in such confinement or detention without sufficient authority: which authority may arise either from some process from the courts of justice; or from some warrant from a legal officer having power to commit, under his hand and seal, and expressing the cause of such commitment; or from some other special cause warranting an arrest for the necessity of the thing, —such as where a felon is arrested in the act by a private person without warrant.] False imprisonment also may arise by executing a lawful warrant or process at an unlawful time, as on a Sunday; for the statute 29 Car. II. c. 7, s. 6, hath declared that such service, except in cases of treason, felony, breach of the peace, or other indictable offence, shall be void (*b*). And here it may be observed, that, under the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 66), s. 10, the act of the magistrate in issuing a search warrant for the arrest of the person alleged to be detaining females for immoral purposes (*c*), is a judicial act; and is therefore an absolute protection to the person procuring such warrant, against any action against him for malicious arrest.

Secondly.—*Injuries affecting Rights of Property.*

We arrive next at the consideration of such injuries as affect the right of *property:* and we will consider, in the first place, injuries to real property; and, secondly, injuries to personal property.

Forster, 12 A. & E. 72; Bird *v.* Jones, 7 Q. B. 742; Turner *v.* Ambler, 10 Q. B. 252.

(*a*) 2 Inst. 589.

(*b*) See Rawlins *v.* Ellis, 16 Mee. & W. 172.

(*c*) Lea *v.* Carrington, 23 Q. B. D. 45.

Firstly,—[Injuries to real property are principally six:—I. Ouster; II. Trespass; III. Nuisance; IV. Waste; V. Subtraction; and VI. Disturbance.

I. *Ouster* (or dispossession) is an injury sustained in respect of hereditaments either corporeal or incorporeal; whereby the wrongdoer gets into the actual occupation of the land or hereditament, and obliges him that hath a right to seek his legal remedy, in order to gain possession, with damages for the injury sustained; but with regard to incorporeal hereditaments, ouster was nothing more than a disturbance of the owner in his means of enjoyment, and that disturbance amounted to an ouster, only if the owner elected so to treat it (*d*). And this injury of ouster or dispossession may even be by one tenant in common, co-parcener, or joint tenant (*e*); and the ouster may be either of the *freehold*, or of *chattels real*.

And, firstly, ouster of the *freehold* may be effected: 1. By *abatement*,—which is where a person dies seised of an inheritance, and, before the heir or devisee enters, a stranger who has no right makes entry, and gets possession of the freehold,—this his entry being called an abatement, and he himself being denominated an abator (*f*). 2. By *intrusion*,—which is the entry of a stranger, after a particular estate of freehold is determined, before him in remainder or reversion,—as happens where a tenant for life dieth seised of certain lands and tenements, and a stranger entereth thereon after the death of such tenant, and before any entry of him in remainder or reversion, such stranger being termed, in the technical sense of the word, an intruder (*g*). 3. By *disseisin*,—which is a wrongful putting out of him that is seised of the freehold: not, as in the other cases, a wrongful entry where the

(*d*) 3 Bl. Com. p 170.

(*e*) Co. Litt. 199 b, 373 b; Smales *v.* Dale, Hob. 120; Stedman *v.* Smith, 8 Ell. & Bl. 1.

(*f*) Finch, L. 195.

(*g*) Co. Litt. 277; F. N. B. 203, 204.

[possession was vacant, but an attack upon him who is in actual possession, and turning him out of it; and as the two former kinds were an ouster from a freehold in law, so this is an ouster from a freehold in deed (*h*). All these three modes of ouster, it is to be observed, are such wherein the entry of the tenant *ab initio*, as well as the continuance of his possession, is unlawful; but the two remaining are where the entry of the tenant was at first lawful, but the wrong consists in the detaining of possession afterwards, namely:—4. By *deforcement*,—which phrase, in its most extensive sense, is *nomen generalissimum*,—a much larger and more comprehensive expression than any of the former,—signifying the holding of any lands or tenements to which another person hath a right (*i*). So that deforcement includes as well an abatement, an intrusion, or a disseisin, as any other species of wrong whatsoever, whereby he that hath right to the freehold is kept out of possession; but, as contradistinguished from the particular ousters previously described, it imports such a detainer of the freehold from him that hath the right of property, but never had any possession under that right, as falls within none of the injuries which we have before explained. *E.g.*, where a lord has a seigniory, and lands escheat to him *propter defectum sanguinis*, but the seisin of the lands is withheld from him: here the injury is not *abatement*, for the right vests not in the lord as heir or devisee; nor is it *intrusion*, for it vests not in him who hath the remainder or reversion; nor is it *disseisin*, for the lord was never actually possessed; but being none of these three, it is therefore a *deforcement* (*k*). Again, if a man marries a woman, and during the coverture is seised of lands in fee simple, or fee tail, and is disseised and dies; or dies in possession,—no act having been done in either of the

(*h*) Taylor *v.* Horde, 1 Ld. Ken. 143; Doe *d.* Maddock *v.* Lynes, 3 B. & C. 388; Doe *v.* Hall, 2 Dow. & Ry. 38; Williams *v.* Thomas, 12 East, 141.

(*i*) Co. Litt. 277; Co. Litt. by Butl. 331 b, n. (1).

(*k*) F. N. B. 143.

[cases to bar or defeat his widow's dower: and the disseisor or heir enters on the tenements, and doth not assign the widow her dower,—this is also a deforcement to the widow, by withholding lands to which she hath a right (*l*); that is, by remaining in possession of the entire lands of the deceased, without setting forth for her any particular lands, in satisfaction of her general claim to one-third. In like manner, if a man lease lands to another, for a term of years or for the life of a third person, and the term expires by surrender, or by efflux of time, or by the death of the *cestui que vie;* and the lessee or any stranger who was, at the expiration of the term, in possession, holds over, and refuses to deliver the possession to him in remainder or reversion,—this is likewise a deforcement (*m*). Another species of deforcement is, where two persons have the same title to land, and one of them enters and keeps possession against the other,—as where the ancestor dies seised of an estate in fee simple, which descends to two sisters as coparceners; and one of them enters before the other, and will not suffer her sister to enter and enjoy her moiety,—this is also a deforcement (*n*).] In addition to all the above modes of ouster, there was formerly another, viz., 5. By *discontinuance*,—which was where a tenant in tail in possession made a feoffment in fee simple, or for the life of the feoffee, or in tail,—all which were beyond the common-law power of a tenant in tail to make; for that extended no further than to allow him to make a lease for his own life, and was not available against the issue or those in remainder or reversion. Such feoffment would formerly have passed an estate in fee simple by *wrong;* and therefore, on the death of the feoffor, became an injury to the heir in tail, or to those in remainder or reversion, (as the case might be,) which was termed a discontinuance (*o*); and such discontinuance formerly took

(*l*) F. N. B. 8, 147.
(*m*) Finch, L. 263; F. N. B. 201, 205-7.
(*n*) Finch, L. 293, 294; F. N. B. 197; Co. Litt. 199 b.
(*o*) Co. Litt. 327 b.

away or tolled the right of entry of the heir in tail, remainderman, or reversioner. But as formerly observed, under the existing law, by 3 & 4 Will. IV. c. 27, this doctrine of tolling the right of entry was abolished; and by 8 & 9 Vict. c. 106, s. 4, a feoffment made after the 1st October, 1845, has now no tortious operation; so that the title by discontinuance, and consequently the injury by that species of ouster, seems to be abolished.

Secondly, [ouster of *chattels real* consists—1. Of amotion of possession from estates held by statute, recognizance, or elegit (*p*),—which happens by a species of disseisin, or turning out of the legal proprietor, before his estate is determined by raising the sum for which it is given him in pledge. And 2. Of amotion of possession from an estate for years (*q*),—which also takes place by a like kind of disseisin, ejection, or turning out of the tenant from the occupation of the land during the continuance of his term.]

The several species and degrees of injury by ouster being thus ascertained, the next consideration is the remedy available in each case; and for this purpose, it is necessary to give some account of the remedies which were antiently available for this species of wrong. Now, according to the antient system, the injury admitted of a variety of remedies, the competency of which depended on the lapse of time and other circumstances; and the distinctions which obtained on this subject may be compendiously stated as follows:—

In the case of abatement, intrusion, and disseisin, the party ousted might have recovered the possession either by an action *possessory*, brought to determine the right of possession; or by an action *droitural*, brought to determine the right of property (*r*); but as the abator, intruder, and

(*p*) Sup. vol. I. p. 302.
(*q*) Sup. vol. I. p. 273.
(*r*) 2 Bl. Com. 197; 3 Bl. Com. 179, 185.

disseisor, had obviously a mere naked possession without colour of right, the law also gave the injured party (while the adverse possession was recent) an extrajudicial remedy by mere *entry;* which remedy, however, if (being under no disability) he neglected, for twenty years, to avail himself of it, was barred by the Statute of Limitations, 21 Jac. I. c. 16. But if the abator, intruder, or disseisor died seised, and the land descended to his heir,—or (in general) if the ouster took place by any of the species of deforcement,—such heir or the deforciant himself (as the case might be) was considered as clothed with a species of presumptive title, sometimes called an *apparent right of possession* (*s*); for the heir in respect of the descent, and the deforciant in respect of the lawful inception of his title, had evidently a better or more colourable right than that gained by mere abatement, intrusion, or disseisin. Under such circumstances, therefore, the possessors were deemed not liable to expulsion by mere entry, but the estate or interest of the person ousted was said to be *turned to a right* (*t*); and it became necessary for him to resort to a real action, either possessory or droitural; and he was also driven to this remedy, even as against an abator, intruder, or disseisor, if (being under no disability) he allowed twenty years to elapse without entering. But these three points must be here observed:—Firstly, that though in general the right of entry, as already stated, was taken away (or *tolled*) by the descent so *cast* upon the heir of the abator, intruder, or disseisor, yet if the claimant were under any legal disability during the life of the ancestor of whom the ouster was effected,—such as infancy, or the like,—the descent had no such operation; Secondly, that by the statute 32 Hen. VIII. c. 33, if the ouster took place by way of *disseisin*, no descent to the heir of the disseisor was to take away the entry, unless the disseisor

(*s*) 2 Bl. Com. 196; 3 Bl. Com. 179.

(*t*) Co. Litt. by Butl. 332 b, n. (1).

himself had peaceable possession for five years; and, Thirdly, that though in general there was no right of entry on a *deforciant*, yet a man might enter on his tenant at sufferance, for such tenant hath no freehold, but only a bare possession, which may be defeated, like a tenancy at will, by the mere entry of the owner (*u*).

The claimant, if he commenced his real action possessory, might have sued out either a writ of *entry* or a writ of *assize*,—in the former showing merely the unlawful commencement of the adverse title, and in the latter proving his own title. But if he neglected to sue out either of those two writs, within the period allowed by law in that behalf; or if judgment, although by default, was given against him in his possessory action; or if the ouster took place upon a discontinuance,—the adverse party was considered as having acquired, in any of these cases, not merely an apparent, but an actual, *right of possession* (*x*). And the effect of this was, that the claimant was now driven to bring his real action droitural, in order to establish his *right of property;* or his *mere right*, as it was then denominated (*y*). And of such droitural actions, the principal one was the *writ of right* (*z*), sometimes called, to distinguish it from others of the droitural class, the *writ of right proper;* and this writ of right was esteemed "the highest writ in the law" (*a*). But there were other writs *in the nature* of the writ of right; such as the writ of *formedon*, which was the remedy for tenant in tail on a discontinuance; for he could not have a writ of right proper (*b*). And these real actions droitural were all subject, like real actions possessory, to a certain period of limitation, that in the writ of right, (which was the most

(*u*) As to tenant at sufferance, vide sup. vol. I. p. 284.

(*x*) 2 Bl. Com. 196; 3 Bl. Com. 179, 191.

(*y*) 2 Bl. Com. 197.

(*z*) Davies *v.* Lowndes, 1 C. B. 435; 3 C. B. 808.

(*a*) 3 Bl. Com. 193.

(*b*) 3 Bl. Com. 191; Tolson *v.* Kaye, 6 Man. & G. 536; Cannon *v.* Rimington, 12 C. B. 1, 515.

extended,) being sixty years. It was competent, moreover, to the defendant in a writ of right, to plead that he had more right to hold than the plaintiff had to claim,—which was called the *mise* upon the mere right; and this question, or issue, he might at one time (at his own option) have referred, either to a species of jury called the *grand assize*, or to *trial by battle* (*c*).

But these antient remedies for redressing this injury of ouster of land, became gradually superseded by a comparatively modern invention of a somewhat anomalous character, to which claimants had been driven to resort by the inadequacy or intricacy of the regular methods. For the redress by *entry* was one rarely in fact available,—particularly as the law required it to be made in a peaceable manner, and subjected to severe penalties those who attempted to regain their tenements by a strong hand. And with respect to the *real actions*, whether possessory or droitural, they were generally unacceptable remedies, from their liability to the following disadvantages—that the course of proceedings in them was dilatory and intricate (*d*);—that the judgment in them was conclusive, so that the plaintiff, failing by any accident in one, was not at liberty to bring another of the same species (*e*); and that they could be brought only in one of the courts of Westminster Hall, viz., the Common Pleas (*f*),—from all which disadvantages, *personal* actions were exempt. And the practitioners in our courts were thus led to the device of adapting one of the personal actions to the object of recovering the possession of land, so as to preclude the necessity of resorting to an action real,—an invention which appears to have been made in the reign either of Henry the seventh or of Henry the eighth; and the personal action adopted for this purpose, was the species of trespass which was called trespass *de ejectione firmæ*,—afterwards compendiously called *an ejectment*.

(*c*) Vide post, vol. iv. bk. vi. ch. xviii.

(*d*) 3 Bl. Com. 184, 205; Hist. Eng. L. by Reeves, vol. iv. p. 166.

(*e*) Reeves, vol. iv. p. 166.

(*f*) Ibid. 170.

This action originally lay only where the plaintiff was a lessee for years, and claimed damages in respect of being ousted from his chattel real,—a decision of the courts having declared, that, besides damages, the plaintiff in such an ejectment was entitled to restitution of the land itself (*g*). Which point being once established, the object in view was obtained, through the medium of a fiction, of which it is sufficient at present to say, that it had the effect of enabling any person who had been ousted of land,—whatever the nature of his title or the circumstances of the ouster might be,—to bring his case forward in the name of a third party claiming in the character of his *lessee for years*, and complaining of an expulsion from the leasehold. This applicability of an ejectment, was subject, however, to this important exception, namely, that as it involved the supposition of entry, by the real claimant, on the lands in dispute, for the purpose of making the pretended lease to the nominal plaintiff, the fiction was incapable of being applied, except where such claimant had a *right of entry;* and the effect of this exception was, that though the real action was in general supplanted by the personal action of ejectment soon after the introduction of the latter, yet in cases in which no right of entry at the time of action existed, recourse continued to be had to the remedy by real action proper; until, by the Act passed in the year 1833 (3 & 4 Will. IV. c. 27), real and mixed actions as a class, with the one or two exceptions already specified, were swept away; and it was thereby enacted (*inter alia*), that, unless in the cases of disability therein mentioned, no entry should be made, or action brought, to recover land, but within twenty years after the right accrued,—a period which has recently been shortened to that of *twelve* years, by the 37 & 38 Vict. c. 57 (*h*).

(*g*) 14 Hen. 7; 3 Bl. Com. 200; Hist. Eng. L. by Reeves, vol. iii. p. 390; vol. iv. p. 165; and 1 A. & E. 751 (n).

(*h*) Vide post, ch. x.

We will now consider the *present* mode of proceeding for the recovery of land, confining our attention in the first place to hereditaments corporeal; and for the recovery of these, the remedy is either by entry or by the action of ejectment. Now the remedy by ejectment, whether it is called an ejectment or an action for the recovery of the possession of land, is by the effect of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), and of the Judicature Acts, commenced and prosecuted and also concluded in every respect like any other ordinary action in the High Court of Justice; that is to say, it is commenced with the ordinary writ of summons indorsed with a claim for the recovery of the possession of the land claimed, and with which claim no other claim may (except by special leave of the court first obtained in that behalf) be joined in the same action, other than claims for mesne profits, or for arrears of rent, or for damages for breach of covenant (*i*); and the usual pleadings, viz., by statement of claim, defence, and reply, follow,—unless where the indorsement on the writ expresses that in case the defendant appears to it the plaintiff intends to proceed to trial without pleadings (*k*); after which, come the trial, judgment, and execution. All which is a great simplification of the action as it existed prior to the Common Law Procedure Act 1852 (15 & 16 Vict. c. 76); for, prior to that Act, the action commenced with a "declaration," complaining at the suit of a fictitious plaintiff (for example, John Doe), against a fictitious defendant (for example, Richard Roe), that a lease for a term of years having been made to Doe by the real claimant, and Doe having entered thereupon, the defendant Roe ousted him; for which Doe claimed damages (*l*); and subjoined was a *notice to appear* addressed to the real tenant in possession, by name, informing him that he, Roe,

(*i*) Order xviii. rule 2.

(*k*) Order xviii. A.

(*l*) In Blackstone's time, it was held, that the person stated in the declaration as plaintiff must be a real person (3 Bl. Com. p. 203); but at a later period of the practice, the plaintiff was always nominal.

was sued as a *casual ejector* only, and had no title to the premises and would make no defence; and therefore advising him to appear in court, in the next Term, and defend his title, otherwise he, Roe, would suffer judgment to be had against him, and thereby the party addressed would be turned out of possession. And, on receipt of this friendly caution, if the tenant in possession did not in due time take the proper steps to be admitted defendant in the stead of Roe, he was supposed to have no right at all; and upon judgment being had against Roe, the casual ejector, the real tenant would be turned out of possession by the sheriff. In the next Term, however, after the service of the declaration, the real tenant had the opportunity of procuring himself to be made defendant; for in the course of that Term, the real claimant, now called the *lessor of the plaintiff*, moved the court, in the name of Doe the fictitious plaintiff, for a rule for *judgment against the casual ejector;* upon which motion, supported by an affidavit of the due service of the declaration, the court made a rule as of course for such judgment, unless the tenant in possession should appear and plead to issue, within the time therein mentioned. And within that time such tenant signed, (by his attorney,) what was called a *consent rule*,—binding him to confess, upon the trial of the cause, that he was at the time of the declaration in possession of the premises therein mentioned, or of part of them; and also to confess the *lease* made by the lessor of the plaintiff, as alleged in the declaration, the *entry* of the plaintiff as therein also stated, and lastly, the *ouster* by himself the tenant in possession. And upon such consent rule being signed, the tenant in possession was allowed by the court to enter an appearance in his own name, and to plead the general issue, *not guilty*. After this the issue was made up, and sent down to trial, as in an action at the suit of Doe (plaintiff), on the demise of A. B. (the lessor of the plaintiff), against C. D. (the tenant in possession): and it is manifest,—that under these circum-

stances, the matter to be tried, *i.e.*, the real and substantial question in the cause, would turn merely upon a fourth point, viz. whether the lessor of the plaintiff had a good *title* to demise, on the day of the supposed demise stated in the declaration. The lessor of the plaintiff was bound to make out a clear title; otherwise his fictitious lessee could not obtain judgment to have possession of the land, for the term supposed to be granted. But if the lessor made out his title in a satisfactory manner, then judgment and a writ of possession was to go for John Doe, the nominal plaintiff: who by this trial had proved the right of A. B. his supposed lessor (*m*).

The remedy by ejectment above described was and is the form of proceeding when a stranger or third party (usually called the claimant) is proceeding to recover land; but this remedy is available (and with further material simplifications) in favour also of a landlord seeking to recover the possession of land from his tenant of such land: and here we must take notice of certain legislative provisions in favour of *landlords*, bringing actions of ejectment or having actions of ejectment brought against their tenants by strangers.

And, firstly, to prevent fraudulent recoveries of the possession by collusion with the tenant of the land, it was enacted, by 15 & 16 Vict. c. 76, s. 209, re-enacting a similar provision contained in 11 Geo. II. c. 19, s. 12, that all tenants should, on pain of forfeiting three years' rent,

(*m*) Originally, the claimant used to make, in fact, a formal entry upon the premises, and there sealed and delivered a lease to some other person; whereupon some third person entered upon him and turned him out; and an action was thereupon brought against the person last mentioned, or *casual ejector*, as he was called; of which, however, the practice required that notice should be given to the tenant in possession. But, inasmuch as great trouble, says Blackstone (vol. iii. p. 202), attended this actual lease, entry, and ouster, the method described in the text of a fictitious lease, entry, and ouster, was invented by the Lord Chief Justice Rolle.

give notice to their landlords of any writ in ejectment delivered to them, or coming to their knowledge; and by 11 Geo. II. c. 19, s. 13, that any landlord (a term which has been held to extend to the heir, remainderman, mortgagee, devisee in trust, and the like,) may, by leave of the court, be made a co-defendant to the action, in case the tenant himself appears to it,—or, if he made default, may, by such leave, become sole defendant (*n*).

Secondly,—It was and still is a rule of the common law, that though there be a proviso for re-entry by the landlord, in the case of rent remaining in arrear, yet he could not (and cannot) have the benefit of that proviso, (unless it is accompanied by an express stipulation to that effect,) without first making a *formal demand* upon the premises of the precise sum claimed, and at the precise time when it became due (*o*). But to obviate these niceties, it was provided, by 15 & 16 Vict. c. 76, s. 210, (re-enacting in substance 4 Geo. II. c. 28, s. 2,) that, in all cases of ejectment between landlord and tenant, if half a year's rent be in arrear (*p*), and there be a right to re-enter for the non-payment (*q*), and no sufficient distress be found (*r*), the landlord may serve a writ in ejectment for recovery of the demised premises; or in case the same cannot be legally served, or no tenant be in actual possession, may affix a copy of the writ upon the door of the messuage, or if there be no messuage, then upon some notorious part of the premises; and that such service or affixing shall stand in the place of a demand and re-entry; and the judgment (with the execution thereon) in such an ejectment is final and conclusive, unless the rent and full costs are paid or tendered within six calendar months after execution; though, on the other hand, the defendant therein may be

(*n*) 15 & 16 Vict. c. 76, s. 172, and Ord. xii. (1883), rr. 25, 26, 27.

(*o*) Duppa *v.* Mayo, 1 Saund. Wms. 287.

(*p*) Gretton *v.* Roe, 4 C. B. 576.

(*q*) Doe *v.* Bowditch, 8 Q. B. 973.

(*r*) Doe *v.* Wandlass, 7 T. R. 117.

relieved from the effect thereof, within such period of six months, and on the above conditions.

Thirdly,—It was enacted, by 15 & 16 Vict. c. 76, s. 213, re-enacting in substance 1 Geo. IV. c. 87, s. 1, that where the interest of any tenant holding under lease or agreement in writing, for term of years certain, or from year to year, should have expired or been determined by regular notice to quit, and, after lawful demand in writing served personally or left at the tenant's usual place of abode, possession should have been refused,—the landlord, at the foot of his writ in ejectment brought to recover the premises, might address a notice to the tenant requiring him to find bail; and on the appearance of the tenant, and by order of the court or a judge, after hearing both parties, the tenant might be required to enter into a recognizance, with two sufficient sureties, to pay the costs and damages which should be recovered by the plaintiff; and on his failure to find such bail, the plaintiff was entitled to judgment for recovery of the possession with costs (*s*); and in such a case, the landlord may now proceed by specially indorsed writ (*t*), and may thereupon obtain summary judgment for the recovery of the land, whether the defendant appears to the writ (*u*), or fails in appearing thereto (*x*).

Fourthly,—It was provided, by 15 & 16 Vict. c. 76, s. 214, re-enacting in substance 1 Geo. IV. c. 87, s. 2, that whenever it should appear in any ejectment between landlord and tenant, that such tenant (or his solicitor) had been served with due notice of trial,—the judge before whom the cause was tried, whether the defendant should appear on the trial or not, should permit the claimant, after proof of his right, to go into evidence of the *mesne* profits thereof which had accrued from the time when the defendant's interest determined, down to the time of the

(*s*) Doe *v.* Sharpley, 15 Mee. & W. 558; Doe *v.* Roe, 6 C. B. 272.

(*t*) Ord. iii. r. 6; Arden *v.* Boyce, (1894) 1 Q. B. 796.

(*u*) Ord. xiv. r. 1.

(*x*) Ord. xiii. r. 8.

trial; and the jury, finding for the claimant, were to give their verdict on the whole matter, both as to the recovery of possession and as to the amount of damages to be paid for such *mesne* profits; and this procedure would still be applicable in such a case (*y*).

Fifthly,—By 4 Geo. II. c. 28, if any tenant for life or years (or other person claiming under or by collusion with such tenant) shall wilfully (*z*) hold over after the determination of the term, and after demand of possession made, and notice in writing given by him to whom the remainder or reversion of the premises shall belong (*a*), an action shall lie against him for the time he detains the land, whereby damages shall be recovered at the rate of *double* their yearly value; and by the statute 11 Geo. II. c. 19, s. 18, any tenant, with power to determine his lease, who shall give notice of his intention to quit, and shall not deliver up possession at the time he mentions, shall pay in like manner double his former rent for such time as he continues thenceforth in possession (*b*).

Moreover, to give landlords, as against their tenants holding over (where the property is of small value), the option of a cheaper and more speedy remedy than that by action, it has been provided, by 1 & 2 Vict. c. 74 (*c*), that a tenant at will (or for a term not exceeding seven years) without rent, or at a rent not exceeding 20*l.* a year, who (or the person occupying under him) shall fail to deliver up possession after his interest has ended or been duly determined, may be ejected (after being served with written notice) by a summary proceeding before *any two justices* of the district; but in such cases, if the landlord has no lawful right to the possession, he will be liable as a

(*y*) Smith *v.* Tett, 9 Exch. 307; Ord. xiii. r. 9.

(*z*) Swinfen *v.* Bacon, 6 H. & N. 184, 846.

(*a*) Blatchford *v.* Cole, 5 C. B. (N. S.) 514.

(*b*) Wilkinson *v.* Colley, 5 Burr. 2694; Soulsby *v.* Neving, 9 East, 314; Page *v.* Moore, 15 Q. B. 684.

(*c*) Jones *v.* Chapman, 14 Mee. & W. 124; Delaney *v.* Fox, 1 C. B. (N. S.) 166; Rees *v.* Davies, 4 C. B. (N. S.) 56; Edwards *v.* Hodges, 15 C. B. 477.

trespasser; and the warrant for possession will be stayed, if the tenant shall give security to bring an action to try the right, and to pay the costs in the event of judgment being given against him. Relief of the same kind, to a landlord against his tenant holding over, is also afforded through the medium of the *county courts*, not only in cases where the yearly value of the tenement is below 20*l.*, but also where such value does not exceed 50*l.* and upon which no fine or premium has been paid,—it being enacted, by 51 & 52 Vict. c. 43, s. 59, re-enacting a similar provision contained in 19 & 20 Vict. c. 108, s. 50, that if the term and interest of the tenant shall have expired or determined by a legal notice to quit, and the tenant (or any person holding or claiming through him) shall neglect or refuse to deliver up possession accordingly, the landlord may enter a plaint in the county court of the district, either against such tenant or such other person as aforesaid; and after judgment given in his favour, may obtain possession, through the high bailiff of the court (*d*), to whom a warrant may be issued for that purpose by the registrar (*e*); but in the case of every such action in the county court, the defendant may obtain the removal thereof into the High Court, upon the ground (when such ground exists) that the title to lands of greater value will be affected by the decision (*f*).

We will next proceed to give some account of the remedy for the particular species of ouster suffered by *dower not being duly assigned* (*g*); in other words, of the real action called the writ of dower *unde nihil habet*. This antient remedy was burthened, in common with others of its class,

(*d*) Hodson *v.* Walker, Law Rep., 7 Exch. 55.

(*e*) There was a former provision nearly to the same effect in 9 & 10 Vict. c. 95, s. 122, as to which see Jones *v.* Owen, 5 D. & L. 669; Ellis *v.* Peachey, ib. 675; Banks *v.* Rebbeck, 2 L., M. & P. 452; Harrington *v.* Ramsay, 8 Exch. 879; 2 Ell. & Bl. 669.

(*f*) 51 & 52 Vict. c. 43, ss. 59—61.

(*g*) 2 Saund. by Wms. 44 c; 3 & 4 Will. 4, c. 27, s. 41.

with a cumbrous process to procure the appearance of the defendant; but was entirely re-modelled by the 23 & 24 Vict. c. 126, it having been thereby enacted, that where an action of dower would lie at the date of that statute, the action might be commenced by an ordinary writ of summons issuing out of the Common Pleas (*h*), and that all the proceedings on such writ should be subject to the same rules and practice, as nearly as might be, as the proceedings in an ordinary action. Supposing the writ to have been duly issued and served, and statement of claim either delivered or otherwise waived or dispensed with, the defendant would defend; and among the defences peculiar to this action, was that of *ne unques seisie que dower*, viz. that the demandant's husband was never seised of such an estate in the lands in question as could give the demandant a legal claim to dower; another defence was that of *ne unques accouple en loial matrimonie*, viz. that the demandant and her supposed husband were never joined in lawful matrimony; and there were also other possible defences, as that the husband was still living; or that the demandant eloped from her husband and lived in adultery with another person (*i*); or that the defendant was *tout temps prist*, viz., that, from the death of the husband, he had always been and still was ready (*prist*) to render the demandant her dower, and rendereth the same into the court (*k*). To the defence *ne unques accouple*, the demandant might reply that she was married at such a place, in such a diocese; on which the course was to award a trial by certificate,—the court sending to the bishop of that diocese to certify whether there was a marriage or not; and to the defence that her husband was still living, she might, of course, reply his death.

In case the verdict is for the demandant, the jury ought also to find, 1, that her husband died seised, and also of

(*h*) 23 & 24 Vict. c. 126, s. 26.

(*i*) Hetherington *v.* Graham, 6 Bing. 135.

(*k*) Sarah Watson, *dem. v.* John Watson, *ten.*, 10 C. B. 3.

what estate, and the time of his death; 2, the annual value of the land; and 3, the amount of damages the widow has sustained by the detention of her dower; and the judgment in this action, when given for the demandant, has been, that she recover seisin of a third part of the tenements in demand, to be set forth by metes and bounds, together with her damages and costs (*l*).

With regard to the remedy for ouster of *hereditaments incorporeal*,—The action of dower, supposing the claimant to be a dowress, is of course available (*m*); and a next presentation may be recovered in an action of *quare impedit;* but, as the general rule, there seems to be no remedy by which incorporeal hereditaments can be specifically recovered; and the party injured must resort to an action, in which he recovers such damages as he may have sustained by the invasion of his right (*n*).

II. Having considered the injury of ouster, we arrive next at that of *Trespass;* by which is here intended a trespass committed in respect of another man's *land*, by entry on the same without lawful authority; which, as distinguished from trespass to a man's person or his goods, is technically called trespass *quare clausum fregit.* [For the right of *meum et tuum* (or property) in lands being once established, it follows, as a necessary consequence, that this right must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil. Every entry, therefore, thereon without the owner's leave, and especially if contrary to his express order, is a transgression, an injury or wrong for satisfaction of which an action will lie to recover such damages as a jury may think proper to assess; and this injury is called trespass *quare clausum*

(*l*) William *v.* Gwyn, 2 Saund. by Wms. 44 e.

(*m*) Rosc. Real Act. 40.

(*n*) Challenor *v.* Thomas, Yelv. 143.

[*fregit* (*o*),—for breaking a man's *close*,—because every man's land is, in the eye of the law, inclosed and set apart from his neighbour's: and that either by a visible and material fence, as one field is divided from another by a hedge: or by an invisible boundary, existing only in the contemplation of the law, as when one man's land adjoins to another's in the same field.

A person must have an actual possession by entry, to be able to maintain an action of trespass *quare clausum fregit* (*p*): and hence before such entry and possession, he cannot maintain this action, though he may have the freehold in law (*q*). And therefore an heir, before entry, cannot have this action against an abator (*r*): and though a disseisee might have it against the disseisor, for the injury done by the disseisin itself, at which time the plaintiff was seised of the land, yet he cannot have it for any act done after the disseisin, until he hath re-gained possession by re-entry; but then he may well maintain it for the intermediate damage done; for after his re-entry, the law, by a kind of *jus postliminii*, supposes the possession to have all along continued in him (*s*). Neither, by the common law, in case of an intrusion or deforcement, could the party kept out of possession sue the wrong-doer, by a mode of redress which was calculated merely for injuries committed on the land while in the *possession* of the owner; but, by the statute 6 Ann. c. 18, if a guardian or trustee for any infant, a husband seised *jure uxoris*, or a person having any estate or interest determinable upon a life or lives, shall, after the determination of their respective interests, hold over and continue in possession of the lands or tenements without the consent of the person entitled

(*o*) So called from the language of the writ of trespass (now disused), which commanded the defendant to show *quare clausum querentis fregit*.

(*p*) 2 Roll. Abr. 553; Lambert *v.* Stroother, Willes, 221; Com. Dig. Trespass.

(*q*) 2 Roll. Abr. 553.

(*r*) Ibid.

(*s*) 11 Rep. 5; Barnett *v.* Guildford, 11 Exch. 19.

[thereto, they are adjudged to be trespassers, and may be sued in trespass accordingly.

A man is answerable not only for his own trespass, but for that of his cattle also; for if by his negligent keeping they stray upon the land of another (and much more if he drives them on), and they there tread down his neighbour's herbage, or spoil his corn or his trees, this is a trespass for which the owner must answer in damages; and the law gives to the party injured in this case a right also to distrain the cattle thus *damage feasant*, or doing damage, till the owner shall make him satisfaction; but if he distrain, he cannot (so long as he holds the distress) bring also an action for damages (*t*).

In some cases an entry on another's land or house is justifiable; as where it is done in the exercise of a right of way, a right of common, or the like; or where a man enters to demand or pay money there payable, or to execute, in a legal manner, the process of the law; or enters by the licence of the owner himself. Also, a man may justify entering into an inn without the leave of the owner first specially asked; because when a man professes the keeping of such inn, he thereby gives a general licence to any person to enter his doors. So a landlord may justify entering to distrain for rent; and a reversioner to see if any waste be committed on the estate, for the apparent necessity of the thing (*u*). And it has been said, that the common law warrants the hunting of ravenous beasts of prey, as badgers and foxes, in another man's land, if no greater damage be done than is necessary; because the destroying such creatures may be profitable to the public (*x*). But

(*t*) Boden *v.* Roscoe, (1894) 1 Q. B. 608; Lehain *v.* Philpott, Law Rep., 10 Exch. 242.

(*u*) Blackstone (vol. iii. p. 213) notices also, and apparently holds, the opinion, that by the common law of England the poor are allowed to enter on a man's ground and glean after harvest. But it has been since his time decided that no such right exists. (Steel *v.* Houghton, 1 H. Bl. 51.)

(*x*) Geush *v.* Mynns, Cro. Jac. 321; Gundry *v.* Feltham, 1 T. R.

[in cases where a man makes an ill use of the authority with which the law thus intrusts him, he shall be accounted a trespasser *ab initio* (*y*): as if one comes into a tavern, and will not go out in a reasonable time, but tarries there all night, contrary to the inclinations of the owner,—this wrongful act shall affect and have relation back even to his first entry, and make the whole a trespass (*z*); but a bare nonfeasance, as not paying for the wine or beer he calls for, will not make him a trespasser, for this is only a breach of contract.] In like manner, if a landlord distrained cattle for rent and wilfully killed the distress, or committed any other irregularity, this by the common law made him a trespasser *ab initio* (*a*): but this is now otherwise (*b*); and no officer of any county court executing a warrant of the court, and no person at whose instance such warrant is executed, is to be deemed a trespasser, by reason of any irregularity or informality in the warrant or in the mode of executing same, or in any proceeding on the validity of which the warrant depends; but, for any special damage, the party injured may have his action on the case (*c*); and this latter species of action would apparently be within the provisions of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), so far at least as regards the bailiff and registrar of the Court.

III. We are next to consider the injury of nuisance, (*nocumentum*, or annoyance,) a term which signifies any thing that worketh hurt, inconvenience, or damage. And a nuisance is of two kinds; such as is *public* or *common*, which affects the public, and is an annoyance to all the lieges,—for which reason it belongs to the class of public

334; Earl of Essex *v.* Capel, before Lord Ellenborough, Hertford Assizes, A.D. 1809, cited in Chitty's Game Law, p. 31.

(*y*) 8 Rep. 146; Finch, L. 47; Bagshawe *v.* Goward, Cro. Jac. 148.

(*z*) 2 Roll. Abr. 561.

(*a*) Finch, L. 47.

(*b*) Vide sup. p. 282.

(*c*) 51 & 52 Vict. c. 43, s. 52.

wrongs or crimes, and may be the subject of an indictment: and such as is *private*, (the object of our present consideration,) which may be defined as anything done to the hurt or annoyance of the hereditaments of another whereby he suffers more than the public at large (*d*), but which does not amount to a trespass thereon (*e*); and in considering the civil injury, we will, first, mark out the several kinds of nuisances, and then mention their respective remedies.

Firstly, the several kinds of nuisances.—As to *corporeal* hereditaments, if a man builds a house so close to mine, that his roof overhangs my roof, and the water flows off his roof upon mine, this is a nuisance, for which an action will lie (*f*); and the case is the same, if the boughs of his tree are allowed to grow so as to overhang my land, which they had not been accustomed to do (*g*). Also, if a person keeps his hogs, or other noisome animals, so near the house of another, previously built and inhabited, that the stench of them incommodes him, and makes the air unwholesome, this is a nuisance, as it tends to deprive his neighbour of the use and benefit of his house (*h*); and a like injury arises, if any offensive trade be set up and exercised close to my land; as a tanner's, a tallow chandler's, a brick-maker's, or the like; for though these are lawful and necessary trades, yet they should be exercised in remote places (*i*). Thus, too, it has been decided, that if one erects a smelting-house so near the land of another that the vapour and smoke thereof kill his corn and grass, or damage his cattle, it is a nuisance (*k*);

(*d*) Benjamin *v.* Storr, Law Rep., 9 C. P. 400.

(*e*) F. N. B. 188.

(*f*) Tod-Heatley *v.* Benham, 40 Ch. Div. 80.

(*g*) Norris *v.* Baker, 1 Roll. Rep. 393; Lodie *v.* Arnold, 2 Salk. 458.

(*h*) Aldred's case, 9 Rep. 58; R. *v.* White, 1 Burr. 337.

(*i*) Morley *v.* Pragnel, Cro. Car. 510; Stockport Waterworks Company *v.* Potter, 7 H. & N. 160; Cavey *v.* Ledbitter, 13 C. B. (N. S.) 470; Bamford *v.* Turnley, 3 B. & Smith, 62; Crump *v.* Lambert, Law Rep., 3 Eq. Ca. 409.

(*k*) 1 Roll. Abr. 89.

and the case is the same, if a man, by carelessness in excavating his own ground, causes the fall of a house erected on land adjoining (*l*). And it may be laid down generally, that if one does any act, in itself lawful, which yet, being done where it is, necessarily tends to damage the land of another, it is a nuisance; for it is incumbent on him to find some other place to do that act where it will be less offensive—the rule being, in this as well as in the other examples above given, *sic utere tuo, ut alienum non lædas* (*m*). Also a nuisance may arise by an omission to perform a legal duty, as if my neighbour is bound to scour a ditch and does not, whereby my land is overflowed (*n*). On the other hand, it is to be remarked, that depriving one of a mere matter of pleasure, as of a fine prospect, by building a wall or the like, or opening a window upon a neighbour whereby his privacy is disturbed, is not an actionable nuisance; inasmuch as such conduct, however ungentlemanly, does not abridge anything really necessary or convenient, and is, therefore, no injury to the sufferer (*o*); and it appears to be settled, that no action is maintainable in respect of an injury (as injurious vibration to a house and the like) consequential on the use of a railway or other undertaking authorized by the legislature (*p*).

The principle of the law is the same with regard to *incorporeal* hereditaments. Thus, it is a nuisance to stop or divert water that ought to run to another's meadow or

(*l*) Dodd *v.* Holme, 1 Ad. & El. 493; Wyatt *v.* Harrison, 3 B. & Adol. 876; Humphries *v.* Brogden, 12 Q. B. 739; Bonomi *v.* Backhouse, 1 Ell. Bl. & Ell. 622; Fletcher *v.* Rylands, Law Rep., 3 H. L. 330; Smith *v.* Fletcher, 2 App. Ca. 781; Angus *v.* Dalton, 6 App. Ca. 640.

(*m*) Firth *v.* Bowling Iron Co., 3 C. P. D. 254; Broder *v.* Saillard, 2 Ch. D. 692.

(*n*) 3 Bl. Com. 218, citing F. N. B. 184; Humphries *v.* Cousins, 2 C. P. D. 239.

(*o*) 9 Rep. 58; Tapling *v.* Jones, 11 H. of L. 290; Butt *v.* Imperial Gas Co., Law Rep., 2 Ch. App. 158.

(*p*) Hammersmith Rail. Co. *v.* Brand, Law Rep., 4 H. L. Ca. 171; London, Brighton & South Coast Rail. Co. *v.* Truman, 11 App. Ca. 45; Sadler *v.* South Staffordshire Tramways, 23 Q. B. D. 17.

mill (*q*). And, again, if I have a way, annexed to my estate, across another's land, and he obstructs me in the use of it, either by totally stopping it, or by putting logs across it, or by ploughing over it, it is in general a nuisance; for in the first case, I cannot enjoy my right at all; and in the latter, I cannot enjoy it so commodiously as I ought (*r*). It is, however, as the general rule, a *damnum absque injuriâ* and no nuisance, if a trade similar to my own is set up by another in my neighbourhood (*s*); though it is an actionable nuisance, if I am entitled to hold a fair, market, or ferry, and another person (unless under the authority of a special Act of Parliament enabling him so to do) (*t*) sets up a fair, market, or ferry so near mine that he does me a prejudice (*u*). But in order to make out a nuisance of this species, it is necessary, 1. That my market or fair be the elder, otherwise the nuisance lies at my own door; and 2. That the market be erected within the third part of twenty miles from mine,—it being reasonable that every man should have a market within such a distance,—one-third of a day's journey,—from his own home; so that, the day being divided into three parts, he may spend one part in going, another in returning, and the third in transacting his necessary business there (*x*).

Secondly, the remedy for a nuisance.—For this injury of nuisance, the party injured may, by action, recover a satisfaction in damages for the injury sustained: and he has also, as it may be recollected, the right to *abate* the nuisance by his own act, a subject of which we have already taken sufficient notice; and in most cases, an injunction may also be obtained from the court, to stay or prevent the nuisance, or to enforce its abatement by the wrong-doer himself, the injunction in these cases being in

(*q*) F. N. B. 184.
(*r*) Ib. 183.
(*s*) Hale on F. N. B. 184.
(*t*) Abergavenny Commissioners *v.* Straker, 42 Ch. D. 83.
(*u*) F. N. B. 184; 2 Roll. Abr. 140; Dorchester *v.* Ensor, Law Rep., 4 Exch. 335.
(*x*) Bl. Com. vol. iii. p. 210.

the nature of the relief formerly obtainable in the real actions of *assize of nuisance* and *quod permittat prosternere* (*y*); and as regards certain varieties of nuisance, the sanitary authority will, by order, procure the summary abatement thereof.

IV. The fourth species of injury to real property is *Waste*. This (as explained in a former part of this work) is any spoil and destruction done, or permitted, by the tenant, to houses, woods, lands, or other corporeal hereditaments, during the continuance of his particular estate therein; which the common law expresses very significantly by the word *vastum*. And this waste is either voluntary or permissive; the one a matter of commission, as by pulling down a house; the other of omission only, as by suffering it to fall into ruin for want of necessary reparations. [Whatever does a lasting damage to the freehold or inheritance is waste; therefore the removal of a wainscot, floors, or other things once fixed to the freehold of a house, is, generally speaking, waste; though it is held, by way of exception from the ordinary rule, that a tenant who has made erections for the purposes of trade, or has put up ornamental fixtures of a kind removable without material damage, may lawfully remove them. But it has been decided, that if a house be destroyed by tempest, lightning, or the like, which is the act of Providence, it is no waste; but otherwise if the house be burned by the carelessness or negligence of the lessee; and where the tenant is bound by covenant or other express contract to keep the house in repair, he is compellable to rebuild, unless the contract was made expressly subject to exception in the event of such inevitable accident (*z*). Waste may also be committed in ponds, dove-houses, warrens, and the like, by so reducing the number of the creatures therein, that there

(*y*) 3 Bl. Com. 220.

(*z*) Saner *v.* Bilton, 7 Ch. D. 815.

[will not be sufficient for the reversioner when he comes to the inheritance (*a*). "Timber" also is part of the inheritance (*b*); oak, ash, and elm being timber in all places; and by the custom of some particular counties, in which other kinds of trees are generally used for building, they also are for that reason considered as timber (*c*); and to cut down timber trees, or to top them, or do any other act whereby they may decay, is waste (*d*); but "underwood" the tenant may cut down at any seasonable time that he pleases (*e*); and he may also, of common right, take sufficient *estovers*, unless restrained (as is usual) by particular covenants or exceptions (*f*). Again, the conversion of land from one species to another, is waste; *e.g.*, to convert wood, meadow, or pasture, into arable; to turn arable, meadow, or pasture into woodland; or to turn arable or woodland into meadow or pasture, are all of them waste (*g*); for, as Sir Edward Coke observes, when such a close, which is conveyed and described as pasture, is found to be arable, and *è converso*, it not only changes the course of husbandry, but affects also the evidence of title to the estate (*h*); and the same rule is observed, for the same reason, with regard to converting one species of *edifice* into another, even though it is thereby improved in its value (*i*), waste of this improving character being known in law as ameliorative waste. Moreover, to open land to search for mines of metal, coal, and the like, is waste; for it is a detriment to the inheritance (*k*); but if the pits or mines were open before, it is no waste for the tenant to continue digging

(*a*) Co. Litt. 53.
(*b*) 4 Rep. 62.
(*c*) Honywood *v.* Honywood, L. R., 18 Eq. 306; Phillips *v.* Smith, 14 Mee. & W. 589; Matthews *v.* Matthews, 7 C. B. 1018.
(*d*) Co. Litt. ubi sup.
(*e*) 2 Roll. Abr. 817.
(*f*) Co. Litt. 41.
(*g*) Lord Darcy *v.* Askwith, Hob. 296.
(*h*) Co. Litt. 53.
(*i*) Cole *v.* Green, 1 Lev. 309; Jones *v.* Chappell, Law Rep., 20 Eq. Ca. 539; Doherty *v.* Allman, 3 App. Ca. 709.
(*k*) 5 Rep. 12.

[them for his own use (*l*); for it is now become the mere annual profit of the land.] And, in general, any acts or neglects hurtful to the inheritance, are wrongful on the part of a tenant who has an estate less than the inheritance; but a tenant in fee, whether fee-simple or fee-tail, is not impeachable for waste: nor is a tenant in tail, even after possibility of issue extinct, because his estate was at its creation an estate of inheritance. And the same doctrine formerly obtained, at law, with reference to an estate *for life*, provided it were limited without impeachment of waste; but in such cases the tenant was always restrained, in equity, from any manifest injury to the inheritance (as by spitefully or without purpose pulling down a house and the like): and it forms one of the provisions of the Judicature Acts, that an estate for life without impeachment of waste, shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate (*m*). It is also esteemed waste, if there is a wood subject to the right of estovers, and the owner of the wood demolishes the whole wood, whereby he destroys the possibility of estovers (*n*). The law, however, does not regard any act, by whomsoever committed, as amounting to waste, unless there be some substantial and considerable damage (*o*); and therefore in a case where the damage done was found to be less than forty pence, judgment was given for the defendant (*p*).

The remedy for waste is either by an action for an injunction in case of impending or continuing waste, or else by action against the wrong-doer, to recover such

(*l*) Lord Darcy *v.* Askwith, ubi sup.

(*m*) 36 & 37 Vict. c. 66, s. 25, sub-sect. (3).

(*n*) 3 Bl. Com. 224; Chilton *v.* Corporation of London, 7 Ch. Div. 562.

(*o*) Doe *d.* Grubb *v.* Lord Burlington, 5 B. & Ad. 507.

(*p*) The Governors, &c. of Harrow School *v.* Alderton, 2 Bos. & Pul. 86.

damages as a jury may award for the waste committed (*q*); and such damages or injunction may be had not only against the tenant, but against any stranger by whom the act has been wrongfully committed, whereby the premises have been damaged; and it will lie at the suit of one joint tenant, or tenant in common, against another who has destroyed the subject of the joint or common property (*r*). We may also remind the reader, that an analogous action—called in this instance an action for *dilapidations*—may be maintained by a rector or vicar against his predecessor, or against the executors of his predecessor (and this for *permissive* as well as for *voluntary* waste), it being held that the incumbent of a living is bound to keep the parsonage house, and chancel of the church, in good and substantial repair; restoring and rebuilding where necessary, according to the original form (*s*).

V. *Subtraction* is another species of injury affecting a man's real property; and it happens when any person who owes any suit, duty, custom, or other service to another, withdraws or neglects to perform it (*t*); and we will consider this injury in its connection with *fealty*, *suit of court*, *rent*, *and customary services*.

Fealty and *suit of court* are among the conditions upon which the antient lords granted out their lands to their feudatories; and consisted in the obligation on the part of

(*q*) Prior to the abolition, by 3 & 4 Will. 4, c. 27, of real and mixed actions, there was also the mixed action of *waste*, by which (see 6 Edw. 1, c. 5) both the demised premises and damages for the waste might have been recovered; and in aid of that action, there was also the writ of *estrepement*, to prevent the commission of the injury *pendente lite;* but in later times, this action became for the most part supplanted by the personal action of trespass on the case (for the reasons of which change, see Co. Litt. 53 b, 54 a, 218 b; 2 Saund. by Wms. 252, n. 7); and the object of the writ of *estrepement* was more conveniently effected by an application for an injunction.

(*r*) 1 Chit. Gen. Pr. 272.

(*s*) Vide sup. vol. II. p. 709.

(*t*) 3 Bl. Com. 230.

those tenants to take the oath of fealty to the lord, and to attend and follow his courts by serving on juries there: and of the same nature also are such *rents* as fall under the legal denomination of rent service; these being the stated returns due, either by antient or modern reservation, from the tenant to his lord, whether in provisions, arms, or the like, or in money: to which last almost all rents are now reduced; and the subtraction or non-observance of any of these conditions of such grant, is an injury to the freehold of the lord, by diminishing the value of his seigniory. Besides which, there arises, whenever *rent* becomes due, (whatever may be its nature, and whether it is connected with the tenure or not,) a *debt* between the parties; the non-payment of which is a pecuniary injury independent of the wrong done to the freehold. For the withholding of fealty, and suit of court, and in general for all rents, there is the peculiar remedy by distress, of which we have already treated: and it seems the only remedy for the two first of these; but to recover rent, there is also a remedy by action (*u*).

[As to *customary services;* the one of most frequent occurrence is that of doing suit to another's mill: where the persons, resident in a particular place, by usage, time out of mind, have been accustomed to grind their corn at a certain mill (*x*). If, under such circumstances, any of them go to another mill and withdraw their suit (their *secta*, *à sequendo*) from the antient mill, this is not only a damage, but an injury to the owner; because this custom

(*u*) See Thomas *v.* Sylvester, Law Rep., 8 Q. B. 368; Searle *v.* Cooke, 43 Ch. D. 510. Formerly there were several *real* actions (now abolished) to recover rent in arrear, viz., the assize of *mort d'ancestor;* and of *novel disseisin;* the writ *de consuetudinibus et servitiis;* and the writ of right *sur disclaimer.* (See 3 Bl. Com. 148, 232; Roscoe on Real Actions, 31, 32, 63, 75.) On the other hand, there were also real actions to redress the oppressions of *the lord;* as the writ *ne injustè vexes,* and the writ of *mesne.* (See 3 Bl. Com. 284; Roscoe on Real Actions, 37, 38.)

(*x*) Harbin *v.* Green, Hob. 233; Drake *v.* Wigglesworth, Willes, 654.

[might have a very reasonable foundation; viz. the erection of such mill by the ancestors of the owner for the convenience of the inhabitants, on condition that when erected, they should grind their corn there only; and, for this injury, the owner may bring his action and recover damages (*y*).]

VI. The last species of injuries to real property—which in some instances, amounts also to the injury of *nuisance* of which we have already treated—is that of *disturbance;* which is the wrongful obstruction of the owner of an incorporeal hereditament, in its exercise or enjoyment: and we shall mention five sorts of this injury,—disturbance of *franchise;* disturbance of *common;* disturbance of *ways;* disturbance of *tenure;* and disturbance of *patronage.*

[Disturbance of *franchise* happens when a man who has any species of franchise, as of holding a court leet, of keeping a fair or market, of free warren, of taking toll, of seizing waifs or estrays, or the like, is disturbed or incommoded in the lawful exercise thereof (*z*). As if another, by menaces or persuasions, prevails upon the suitors not to appear at my court; or obstructs the passage to my fair or market (*a*); or hunts in my free warren; or refuses to pay me the accustomed toll; or hinders me from seizing the waif or estray, whereby it escapes or is carried out of my liberty,—in every case of this kind, there is an injury done to the legal owner: his property is damnified, the profits arising from his franchise being diminished; to

(*y*) Vyvyan *v.* Arthur, 1 B. & C. 410; Richardson *v.* Walker, 2 B. & C. 827. Formerly the person injured was enabled to compel the specific performance of the service withdrawn, by the writs (all now abolished) *de sectâ ad molendinum, ad furnum, ad torrale*, and the like. (F. N. B. 123; Roscoe on Real Actions, 36.)

(*z*) As to *ferries*, see Hopkins *v.* Great Northern Railway Company, 2 Q. B. D. 224; and as to *fairs* and *markets*, see Att.-Gen. *v.* Horner, 14 Q. B. D. 245; Great Eastern Railway Company *v.* Goldsmid, 9 App. Ca. 927.

(*a*) Dorchester *v.* Ensor, Law Rep. 4 Exch. 335.

[remedy which, he is entitled to sue for damages, or, in case of the refusal to pay toll, may take a distress if he pleases (*b*).

The disturbance of *common* comes next to be considered; and this is, where any act is done by which the right of another to his right of common is incommoded or diminished; which may happen in these three varieties of cases, that is to say:—1. Where one who hath no right of common puts his cattle into the land,—and thereby robs the cattle of the commoners of their respective shares of the pasture; or where one, who hath a right of common, puts in cattle which are not commonable, as hogs and goats,—which amounts to the same inconvenience. But the lord of the soil may, by custom or prescription (but not without), put a stranger's cattle into the common (*c*): and also, by a like prescription for common appurtenant, cattle that are not commonable may be put into the common (*d*); in general, however, if the beasts of a stranger, or the uncommonable cattle of a commoner, be found upon the land, the lord, or any of the commoners, may either drive them off, or distrain them *damage feasant* (*e*), or bring their respective actions and recover damages. 2. Another disturbance of common is by surcharging it, or putting more cattle thereon than the pasture and herbage will sustain, or the party hath a right to do,—in which case he that surcharges does an injury to the rest of the owners, by depriving them of their respective portions, or at least contracting them into a smaller compass. This injury by surcharging can, properly speaking, only happen where the right of common is appendant or appurtenant, and of course limitable by law, or where, when in gross, it is expressly limited and certain; for where a man hath (if he can have) common in gross *sans nombre* or *without stint*, as it is more commonly called, he cannot be a surcharger;

(*b*) Heddy *v.* Wheelhouse, Cro. Eliz. 558.

(*c*) 1 Roll. Ab. 396.

(*d*) Co. Litt. 122.

(*e*) 9 Rep. 112.

[however, even where a man is said to have common without stint, still there must be left sufficient for the lord's own beasts; for the law will not suppose that, at the original grant of the right of common, the lord meant to exclude himself (*f*). The usual remedies for surcharging the common are either by distraining so many of the beasts as are above the number allowed; or else by an action, and in such action any commoner may be plaintiff; and that as well against the lord as against another commoner (*g*). 3. In addition to the above, there is another disturbance of common, when the owner of the land, or other person, so incloses or otherwise obstructs it, that the commoner is precluded from enjoying the benefit to which he is by law entitled,—which may be done either by erecting fences, or by driving the cattle off the land, or by ploughing up the soil of the common (*h*).] Or it may be done by erecting a warren therein, and stocking it with rabbits in such quantities that they devour the whole herbage, and thereby destroy the common; though, on the other hand, the lord may lawfully erect a warren, provided the rabbits do not increase so as to occasion this inconvenience (*i*). For each of these injuries the commoner may have his action (*k*), and, in certain instances,—as where the obstruction is occasioned by a fence or wall,—he may *abate* it, or throw it down; but he may not cut down trees wrongfully planted by the lord; or kill his rabbits destroying the common, or even fill up the coney-burrows; but his remedy in such latter cases is by action

(*f*) 1 Roll. Ab. 399.

(*g*) Freem. 273; 1 Saund. by Wms. 346, n. (2). Until the general abolition of real actions, there was also the *writ of admeasurement of pasture;* as to which see F. N. B. 126.

(*h*) Leverett *v.* Townshend, Cro. Eliz. 198.

(*i*) Bellew *v.* Langdon, Cro. Eliz. 876; Hadesden *v.* Gryssel, Cro. Jac. 195; Farrer *v.* Nelson, 15 Q. B. D. 258.

(*k*) Before the abolition of real actions, he was also entitled to the writ of *novel disseisin* or *quod permittat;* as to which, see 3 Bl. Com. p. 22; Roscoe on Real Actions, p. 40.

only; in which action he may in general obtain also an injunction against the wrong-doer (*l*).

[The third species of disturbance, that of *ways*, happens when a person who hath a right of way over another's grounds is obstructed by enclosures or other obstacles, or by ploughing across it: by which means he cannot enjoy his right of way, or at least not in so commodious a manner as he might have done; and the remedy is either by abating the obstruction; or by an injunction, to be obtained in an action.

The fourth species of disturbance is that of *tenure*, or breaking that connection which subsists between the lord and his tenant, and to which the law pays so high a regard, that it will not suffer it to be wantonly dissolved by the act of a third person. To have an estate well tenanted is an advantage that every landlord must be very sensible of; and therefore the driving away of a tenant from off his estate is an injury of no small consequence; so that if there be a tenant at will of any lands or tenements, and a stranger, either by menaces and threats, or by unlawful distresses, or by fraud and circumvention, or other means, contrives to drive him away, or inveigles him to leave his tenancy,—this the law very justly construes to be a wrong and injury to the lord, and gives him an action whereby he may obtain damages against the offender (*m*).

The fifth species of disturbance,—and by far the most considerable,—is that of disturbance of *patronage;* which is to hinder or obstruct the patron in the presentation of his clerk to a benefice. And this injury was distinguished, at common law, from another species of injury in regard to an advowson, called *usurpation;* which happens when a stranger that hath no right presenteth a clerk, and he is thereupon admitted and instituted (*n*). By this injury of usurpation, the patron was, by the common law, absolutely

(*l*) 1 Saund, by Wms. 353 a.
(*m*) Hal. Anal. c. 40; 1 Roll. Ab. 108.
(*n*) Co. Litt. 277; Keen *v.* Denny, (1894) 3 Ch. 169.

[ousted and dispossessed, losing not only his turn of presenting *pro hâc vice*, but losing also the absolute and perpetual inheritance of the advowson, and for the recovery of which he was, therefore, obliged to resort to his remedy by the real action termed a *writ of right of advowson;* and until he had recovered his right of advowson in that action, he could not, upon the next avoidance, present to the living (*o*). The reason given for his losing the present turn, and not being able to eject the usurper's clerk, was, that, the final intent of the law in creating this species of property being to have a fit person to celebrate divine service, it preferred the peace of the church (provided a clerk were once admitted and instituted) to the right of any patron whatever;] and the reason why the patron lost also the inheritance of his advowson, was, that, by such usurpation, his possession of the advowson was considered as displaced; and the law allowed no remedy, either by presentation or possessory action, nor otherwise than by a writ of right, to a person put out of possession of an hereditament of this description; and the only remedy therefore of the patron in such a case, was to try the mere right in a writ of *right of advowson.*

[But bishops in antient times, either by carelessness or collusion, frequently instituting clerks upon the presentations of usurpers, and thereby defrauding the real patrons of their right of possession, it was in substance enacted, by the statute of Westminster the second, 13 Edw. I. c. 5, s. 2, that if either the possessory action of *quare impedit* (which was the general action) or the assize of *darreign presentment* (which was available only for a patron entitled by *descent*) (*p*), should be brought within six months after the avoidance, the patron should, notwithstanding such usurpation, recover the then presentation, and (with it) seisin also of the advowson. But even after this provision, if the true patron omitted to bring his action within six

(*o*) 6 Rep. 49; F. N. B. 30. (*p*) 3 Bl. Com. 245.

[months, the seisin remained with the usurper; and the patron, to recover it, was still driven to his writ of right; to remedy which it was further enacted, by the statute 7 Ann. c. 18, that no usurpation should displace the estate or interest of the patron, or turn it to a mere right; but that the true patron might present, upon the next avoidance, as if no such usurpation had happened (*q*). So that the title of usurpation is now much narrowed, and the law stands upon this reasonable foundation,—that if a stranger usurps my presentation, and I do not pursue my right within six months, I shall lose that turn without remedy, for the peace of the church, and as a punishment for my own negligence; but that turn is the only one I shall lose thereby; and usurpation now gains no right to the usurper with regard to any future avoidance, but only to the present vacancy; and during the six months it is only a species of disturbance, and, within that time (but not afterwards), may be remedied by bringing a *quare impedit*.

Upon the vacancy of a living, the patron, we know, is bound to present within six calendar months, otherwise it will lapse to the bishop. But if the presentation be made within that time, the bishop is bound to admit and institute the clerk if found sufficient; unless indeed the church be full, or there be notice of any litigation, it being usual for each party, when the right is in contest, to enter a *caveat* with the bishop, to prevent his institution of the antagonist clerks; and an institution after a *caveat* entered, is void by the ecclesiastical law, although the temporal courts pay no regard to a *caveat*, and look upon it as a mere nullity (*r*). But if two presentations be offered to the bishop upon the same avoidance, the church is then said to become *litigious;* and if nothing further be done, the bishop may suspend the admission of either, and suffer a lapse to occur; yet if the patron or clerk on either side

(*q*) Robinson *v.* Marquis of Bristol, 20 L. J., C. P. 208.

(*r*) Hitching *v.* Glover, 1 Roll. Rep. 191.

[request him to award a *jus patronatûs*, he is bound to do it. Now a *jus patronatûs* is a commission from the bishop, directed usually to his chancellor and others of competent learning; directing them to summon a jury of six clergymen and six laymen, to inquire into and examine who is the rightful patron; and if, upon such inquiry made and certificate thereof returned by the commissioners, the bishop admits and institutes the clerk of that patron whom they return as the true one, he secures himself at all events from being a disturber, whatever proceedings may be had afterwards in the temporal courts (*s*); but the clerk who is refused by the bishop has his remedy in the spiritual court, by *duplex querela*,—this remedy being a complaint in the nature of an appeal from the ordinary to his next immediate superior, *e.g.*, from the bishop to the archbishop (*t*), with an ultimate right of appeal to the Privy Council (*u*); and if the court of appeal adjudge the cause of refusal to be insufficient, it will grant institution to the appellant. But apparently the remedy by *duplex querela* in the spiritual court may not proceed concurrently with the remedy by *quare impedit* in the temporal court (*x*).

And in fact the usual course is, that upon the first delay or refusal of the bishop to admit his clerk, the patron usually brings his *quare impedit* for the temporal injury done to his property, in disturbing him in his presentation. For the patron is always plaintiff in this action, and not the clerk: as the temporal law supposes the injury to be offered to the patron only, by obstructing or refusing the admission of his nominee; and not to the clerk, who hath no right in him till institution, and of course can suffer no injury. But as to the parties *against* whom the action is to be brought, it is to be observed, that all these three persons, the pseudo-patron, his clerk, and the ordinary, may be disturbers of a right of advowson,—the pretended patron,

(*s*) 1 Burn, 24.
(*t*) Ib. 159.
(*u*) Gorham *v.* Bishop of Exeter, 15 Q. B. 52.
(*x*) Walsh *v.* Bishop of Lincoln, Law Rep., 4 Adm. & Eccl. 242.

[by presenting to a church to which he has no right, and thereby making it litigious or disputable; the clerk, by demanding or obtaining institution, which tends to and promotes the same inconvenience; and the ordinary, by refusing to admit the real patron's clerk, or by admitting the clerk of the pretender. Accordingly, if the delay arises from the bishop alone, as upon pretence of incapacity or the like, then he only may be named as defendant; if there be another presentation set up, then the pretended patron and his clerk must be joined in the action; or it may be brought against the patron and his clerk, leaving out the bishop, or against the patron only. However, it is most advisable to bring it against all three; for if the bishop be left out, and the action be not determined till the six months are passed, he is entitled to present by lapse; but if he be named, no lapse can possibly accrue till the right is determined (*y*); and if the false patron be left out, and the writ be brought only against the bishop and the clerk, the action is of no effect, for the right of the patron is the principal question therein (*z*); and if the clerk be left out, and has received institution before the action brought (as is sometimes the case), the patron may recover his right of patronage, but not the then turn; for the patron cannot have judgment to remove the clerk, unless he be made a defendant, so that he may allege what he can in his defence; for which reasons it is the safer way, as we have said, to insert all three in the writ (*a*).]

Finally, we may remark, that though in a *quare impedit* the patron only, and not the clerk, is allowed to sue the disturber, yet there is one species of presentation in respect of which a remedy distinct from an action, to be sought in the temporal courts, is put, by statute, into the hands of the clerk presented, as well as of the owners of

(*y*) Lancaster *v.* Lowe, Cro. Jac. 93.

(*z*) 7 Rep. 25; Elvis *v.* Archbishop of York, Hob. 392.

(*a*) 3 Bl. Com. 248.

the advowson; and this is in the case of a presentation to a benefice belonging to a Roman Catholic patron, which (as we mentioned in a former book, when treating of the endowments of the Church) (*b*), becomes (according to the place in which it is situate) vested by law either in the university of Oxford or in that of Cambridge. [For in such a case, besides the action of *quare impedit* which the university is entitled to bring as patron, it has been provided, by 13 Anne, c. 13, that either the university or the clerk presented by them shall be at liberty to take proceedings, in order to compel a *discovery* of any secret trusts for the benefit of Papists, in evasion of those laws whereby this right of advowson became vested in these learned bodies: and also (by the stat. 11 Geo. II. c. 17) to compel a discovery whether any grant or conveyance said to be made of such advowson was made *bonâ fide* to a Protestant purchaser, for the benefit of Protestants and for a full consideration,—without which requisites, every such grant and conveyance of any advowson or presentation is absolutely null and void. But this is a particular law, and calculated for a particular purpose; and in no instance but this, does the temporal law permit the *clerk* himself to interfere, in recovering a presentation of which he is afterwards to have the advantage.]

The action of *quare impedit* used formerly to be commenced by original writ; and as the general rule, such writ was returnable into the Court of Common Pleas only (*c*). The writ, in its form, directed the sheriff to command the defendants who disturbed the presentation (that is, in general, the bishop, patron, and clerk) to permit the plaintiff to present a fit person (without specifying whom) to such a vacant church which he claimed to be in his gift, and his presentation to which the defendants unjustly hindered; and unless they so did, then to appear

(*b*) Vide sup. vol. II. p. 712.

(*c*) Tolson *v.* Bishop of Carlisle, 3 C. B. 41; 5 C. B. 761; Dyversité des Courtes, ch. Bank le Roi.

in court on such a day to show *why they hindered him* (*d*). But by the Common Law Procedure Act, 1860, it was enacted, that where a *quare impedit* would lie at the date of that statute, an action might be commenced by writ of summons, issuing out of the Common Pleas, in the same manner and form as the writ of summons in an ordinary action; and that all proceedings upon such writ should be subject to the same rules and practice, as nearly as might be, as obtained in other actions (*e*); and under the Judicature Acts, the writ of summons in this action, and all the subsequent proceedings on such writ, is wholly assimilated to the writ of summons with which any ordinary action is commenced (*f*).

The plaintiff in this action should, in his statement of claim, show a title in himself or his ancestors, or those under whom he claims,—an actual presentation under that title,—and a disturbance before the action brought (*g*). Upon this, the bishop and the clerk usually disclaim all title, save only, the one as *ordinary* to admit and institute, and the other as presentee of the patron; and the patron is therefore left to defend his own right (*h*). Indeed, it was a rule at the common law, that neither the ordinary

(*d*) "Immediately on the suing "out of the *quare impedit*," says Blackstone (vol. iii. p. 248), "if the "plaintiff suspects that the bishop "will admit the defendant or any "other clerk pending the suit, he "may have a prohibitory writ "called a *ne admittas*;" and "if the "bishop doth, after the receipt of "this writ, admit any person, even "though the patron's right may "have been found in a *jus patronatûs*, then the plaintiff, after he "has obtained judgment in the "*quare impedit*, may remove the "incumbent, if the clerk of a "stranger, by *scire facias*, and shall "have a special action against the "bishop, called a *quare incumbravit*, "to recover the presentation, and "also satisfaction in damages for "the injury done him by incumbering the church with a clerk "pending the suit, and after the "*ne admittas* received."

(*e*) 23 & 24 Vict. c. 126, s. 27. No special mention of the action of *quare impedit* is made in the Judicature Acts or the Rules of Court, except that in the latter, one of the indorsements of claims given refers to this action by name.

(*f*) Append. A. pt. iii. (1883).

(*g*) Brickhead *v.* Archbishop of York, Hob. 250.

(*h*) 3 Bl. Com. 249.

nor the clerk should plead to the right of patronage, as neither of them had anything therein; but, by 25 Edw. III. st. 6, c. 7, the ordinary may now do so, provided he has himself collated by lapse, and the clerk, if he has been collated, or presented and instituted (*i*); that is, they may respectively defend their own right so to collate, or to be instituted; or if they mean to deny that they have obstructed the presentation, they may so frame their defence (*k*); and as this does not deny the right of the plaintiff, it entitles him, so far as these defendants are concerned, to immediate judgment to recover his presentation; though he has also the option of maintaining, if he thinks fit, that a disturbance has in fact been committed, which, if proved, will give him a right to recover damages. The bishop may also defend himself, on the ground that the clerk presented by the plaintiff was unfit, for want of learning or otherwise, to be instituted (*l*). The patron, also, may rely on the defence of *plenarty*, viz., that the church has been full for six calendar months before the issue of the writ, by virtue of his own presentation (*m*); or may state, by way of defence, like the ordinary and clerk, and with the same effect, that he did not obstruct the presentation (*n*); or he may traverse the title alleged by the plaintiff in his declaration. Here, however, this difference is to be observed, that though, as a mere answer to the action, such traverse is a sufficient defence, yet it may be often necessary to go further; for in a *quare impedit*,

(*i*) 7 Rep. 26 a; Elvis *v.* Archbishop of York, Hob. 392; Apperley *v.* Bishop of Hereford, 9 Bing. 681; Storie *v.* Bishop of Winchester, 9 C. B. 62; 17 C. B. 653; Roscoe on Real Actions, 231, 239, 241.

(*k*) The mode of raising such defence has been to plead *ne disturba pas*, which was the general issue in *quare impedit;* but see now Ord. xix. (1883), r. 15.

(*l*) Bishop of Exeter *v.* Marshall, 3 App. Cas. 17; Heywood *v.* Bishop of Manchester, 12 Q. B. D. 404; Abergavenny (Marquis) *v.* Llandaff (Bishop), 20 Q. B. D. 460.

(*m*) Stat. Westm. 2, c. 5; Roscoe on Real Actions, pp. 234, 240.

(*n*) Colt *v.* Bishop of Coventry, Hob. 193; R. *v.* Bishop of Worcester, Vaughan, 58.

both parties are in a manner plaintiffs, and either of them entitled to a judgment that he recover the presentation, and have a writ to the bishop for the admission of his clerk: if, therefore, the patron defendant wishes to obtain a judgment of this description, and not merely a judgment discharging him from the action, (which will naturally be the case, unless he has presented, and his clerk has been actually admitted,) he must, in addition to the traverse, set forth some matter showing title in himself (*o*).

Upon the failure of the plaintiff, at the trial of a *quare impedit*, to make out his title, the defendant is put upon the proof of *his*,—that is, if he has asserted title in his statement of defence. And if the right be found for the plaintiff, three further points are also to be inquired into, —1. Whether the church be full or not; and if it be, upon whose presentation it is full;—2. The yearly value of the church;—3. Whether six calendar months have passed since the avoidance,—all which matters are material to be ascertained, in order to determine the nature of the damages to which the plaintiff may be entitled (*p*). For at common law no damages were recoverable in a *quare impedit;* but by the statute of Westminster the second (13 Edw. I.), c. 5, if more than six calendar months have passed by reason of the disturbance of any person, so that the bishop has presented by lapse, and the true patron has lost his presentation, damages shall be adjudged against the disturber, to the amount of the value of the church for two years; or if the six calendar months have not passed, then damages to the value of the moiety of the church for one year (*q*).

The judgment for the plaintiff in a *quare impedit* is, that he recover his presentation, and have a writ to the bishop,

(*o*) Tufton *v.* Temple, Vaugh. 78; Carlisle *v.* Whaley, 2 App. Cas. 391, 409.

(*p*) 2 Inst. 362; 6 Rep. 49 a; Poyner *v.* Chorleton, Dy. 134 b; 3 Bl. Com. 249.

(*q*) 6 Rep. 51 a; Inst. ubi sup.; Henslow *v.* Bishop of Sarum, Dy. 76 b.

commanding him to admit his clerk (*r*); and also that he recover his damages and costs; and such also (with the exception of the damages) is the judgment for the defendant, where he has made out his own title to present. No costs, indeed, were formerly recoverable by either party in *quare impedit;* but by 4 & 5 Will. IV. c. 39, where a verdict was given for the plaintiff, he was to have his costs in addition to his damages; and where a verdict was given against him, or he discontinued or was nonsuited, he was to pay costs to the adverse party, though this was subject to a proviso, that no judgment for costs should be had against any archbishop, bishop, or other ecclesiastical patron or incumbent if the court or judge certified that he had probable cause for defending the action; it being, however, declared, that in no case where the defence was grounded on a presentation or collation, previously made, should such presentation or collation be deemed a probable cause of defence within the meaning of such proviso (*s*). And though, in consequence of the general discretion now vested in the High Court in the matter of costs, this Act has been now repealed (*t*), it is apprehended that such discretion would be still exercised, so as to relieve the defendant from costs under the circumstances therein mentioned.

Of injuries to real property we have now said enough, and we pass on to consider the injuries to *personal* property,—firstly, as regards things in *possession*, and secondly, as regards things not in possession, *i.e.*, things in *action*.

Firstly, the rights of personal property in *possession* are liable to two species of injuries: the amotion or deprivation of that possession; and the abuse or damage of the

(*r*) F. N. B. 38; 3 Bl. Com. 250.

(*s*) Edwards *v.* Bishop of Exeter, 6 Bing. N. C. 146.

(*t*) Order lxv. (1883), r. 1; M'Clellan *v.* M'Clellan, 29 Ch. D. 495; Hill *v.* Spurgeon, ib. 348; Badische *v.* Levinstein, ib. 366; but see Garnett *v.* Bradley, 3 App. Ca. 944; Ex parte Mercers' Co., 10 Ch. D. 481.

chattels, while the possession continues in the legal owner. The injury of deprivation of possession, is also divisible into several branches—such as the taking of the goods away unlawfully—their unlawful detention, though the original taking may have been lawful—and such tortious acts as subject the owner to the loss of them, though the wrong-doer himself may be guilty neither of caption nor of detainer; and our present subject will therefore involve four several heads:—1, the injury of unlawfully taking chattels from the owner; 2, that of unlawfully detaining them from him; 3, that of unlawfully depriving him of them, by means other than detention; and 4, that of doing damage to them while in his possession.

1. And, first, of an unlawful *taking*.—The nature of this requires no illustration, and our attention, therefore, is to be chiefly directed to its remedy. The first remedy we shall notice is, that of procuring the restitution of the goods themselves, together with damages for the loss sustained by their unjust invasion; and this is effected by the action of *replevin*, an institution which the Mirrour ascribes to Glanvil, chief justice to King Henry the second (*u*). But this action is seldom resorted to in practice, except in one instance of an unlawful taking,—viz. that of a wrongful distress (*x*); and it is always preceded by an application on the part of the owner, to the proper authority, to cause the goods taken to be *replevied;* that is, re-delivered to the owner, upon his giving such security as the law requires for trying the legality of the distress. An application for this purpose used formerly to be made in the antient county court incident to the jurisdiction of the sheriff; but by the Acts establishing and regulating the modern courts of the same name, the jurisdiction of the sheriff in this matter has been abolished (*y*), and the appli-

(*u*) 3 Bl. Com. p. 145.

(*x*) Co. Litt. 145 b; Vin. Ab. Replevin (B.); Com. Dig. Action (M. 6); George *v.* Chambers, 11 Mee. & W. 149; Morrell *v.* Martin, 3 Man. & Gr. 581; Mellor *v.* Leather, 1 Ell. & Bl. 619.

(*y*) 51 & 52 Vict. c. 43, s. 134,

cation is now to be made to the registrar of one of *those* courts, viz. that one within the district of which the distress was taken (*z*). The registrar, on receiving this application, causes the goods to be replevied accordingly by an officer of the court, and delivered to the owner on his giving proper security that he will commence in the county court an action of replevin against the distrainor, within one month from the date thereof; that he will prosecute such action with effect and without delay; and that he will make return of the goods, if in the result a return of the same shall be adjudged (*a*). The owner, (or replevisor,) is also entitled, at his option, to give security to commence such action in the High Court of Justice instead of in the court of inferior jurisdiction; but in this latter case, the security must be conditioned that he will do so within one week (instead of one month) from its date, and not only that he will prosecute the same with effect and without delay, and make return of the goods if a return shall be adjudged,—but also that, (unless he obtains judgment in such action by default,) he will prove before such High Court, that he had good ground for believing, either that the title to some corporeal or incorporeal hereditament, the rent or value whereof exceeded 20*l.* by the year, or to some toll, market, fair, or franchise, was in question, or that the rent or damage, in respect of which the distress was made, exceeded 20*l.* (*b*). Security in one or other of these forms having been given, the replevisor proceeds accordingly to commence his action of replevin either in the county court or in the High Court, as the case may be: but if he brings it in the former, it may be *removed*, by the defendant, (or distrainor,) into the High Court by writ of *certiorari*, or by order in the nature of such a writ; to obtain which writ or order the defendant must apply to the High Court or to a judge thereof, and must give

re-enacting the like provisions in the earlier County Court Acts; vide sup. p. 311.

(*z*) Ibid. s. 133.
(*a*) Ibid. ss. 134, 136.
(*b*) 51 & 52 Vict. c. 43, s. 135.

security, (not exceeding 150*l.*,) to defend such action with effect, and—unless the replevisor shall discontinue, or shall not prosecute such action, or become nonsuit therein—to prove before the High Court that he, the defendant, had good ground for believing to the effect already set forth in the case of an action brought in such court by the replevisor (*c*).

If an action of replevin be brought by the owner of the goods against the distrainor in accordance with the condition on which he obtained their return, then the distrainor's defence may be a denial that he ever took the goods; but more often it admits such taking, and insists that the goods were lawfully taken as a distress, and claims a *return* of the goods; and such a defence is called an *avowry*, or (if the distress was made not in the defendant's own right but as servant for another) a *cognizance*. In reply to such defence, the plaintiff was enabled, by 23 & 24 Vict. c. 126, s. 23, to pay money into court in satisfaction of the rent (in the case of a distress for rent) alleged therein to be in arrear, in like manner, and subject to the same proceedings, as upon a payment into court by a defendant in other actions; it being however provided, that such payment into court should not, nor should the acceptance thereof by the defendant in satisfaction, work a forfeiture of the replevin bond into which the plaintiff entered in the county court (*d*); or the plaintiff in answer to the avowry, may deny any rent to be due; all which rules and distinctions are still (in effect) applicable under the Judicature Acts.

The judgment in replevin, when given in favour of the plaintiff, awards damages for the unlawful taking and detaining; and when given for the defendant, awards either a return of the goods, or (if the distress was for rent) then, at the option of the defendant, a recovery of the amount of the rent in arrear; for by 17 Car. II. c. 7, if the plaintiff discontinue his action of replevin before issue

(*c*) Sect. 137. (*d*) 23 & 24 Vict. c. 126, s. 24.

joined, the defendant may have a writ to inquire into the value of the distress by a jury, and may recover the amount of such value as damages, if less than the arrear of rent; or if more, then so much as shall be equal to such arrear, with costs; or if the plaintiff be nonsuited, or if the verdict be against him, then the statute directs, that the jury shall assess such arrears for the defendant; and if (in any of these cases) the distress be found insufficient to answer the arrears distrained for, the defendant may take a further distress or distresses.

[Another action for the unlawful taking of a man's goods, and one of much more extensive use than replevin, is the action of trespass, and which action, when more fully designated, is the action of trespass *de bonis asportatis;* and whenever a man takes the goods of another out of his actual or virtual possession, without having a lawful title so to do, it is an injury, which (though it doth not amount to felony, unless it be done *animo furandi*) is a transgression, for which an action of trespass will lie; and herein the plaintiff shall not recover the thing itself, but only damages for the loss of it; or the party aggrieved may, at his choice, have another remedy in damages, by an action of trover and conversion, of which more will presently be said.

2. Deprivation of possession may also be by an unjust *detainer* of another's goods, although the original taking was lawful. As if I distrain another's cattle damage feasant, and before they are impounded he tenders me sufficient amends; now though the original taking was lawful, my subsequent detention of them, after tender of amends, is wrongful, and he may have an action of replevin against me to recover them (*e*); in which he shall recover damages for the *detention*, though not for the *caption*, because the original taking was lawful. Or, if I lend a man a horse, and he afterwards refuses to restore

(*e*) F. N. B. 89.

[it, this injury consists in the detaining, and not in the original taking; and the regular method for me to recover possession is by action of detinue (*f*): in which the judgment is conditional that the plaintiff recover the chattel (or, if it cannot be had, its value), and also certain damages for detaining the same.] Formerly the defendant, on this judgment, had his option to re-deliver the goods themselves, or else to render their value, at his pleasure; but now,—in cases where the value is assessed in the verdict,—application may be made by the plaintiff to the court or a judge, for a special writ of execution, under which the chattels detained may be seized; or if they cannot be found, then that the property of the defendant himself be distrained, till a return be made (*g*). And as one object in the action of detinue is thus to obtain (if possible) specific restitution, so it will not lie for money, corn, or the like; unless it be in a bag or a sack, for then (and not otherwise) it may be distinguishably marked. This form of action was also formerly subject (as were some other of our legal remedies), to the incident of *wager of law* (*vadiatio legis*),—a proceeding which consisted in the defendant's discharging himself from the claim on his own oath, bringing with him at the same time into court eleven of his neighbours, to swear that they believed his denial to be true (*h*). This relic of a very antient and general institution, which we find established not only among the Saxons (*i*) and Normans (*k*), but among almost all the Northern nations that broke in upon the Roman empire (*l*), continued to subsist among us even till the last reign, when it was at length abolished by 3 & 4 Will. IV. c. 42, s. 13 (*m*): and

(*f*) F. N. B. 138; Jones *v.* Dowle, 9 Mee. & W. 19; Williams *v.* Archer, 5 C. B. 318; Reeve *v.* Palmer, 5 C. B. (N. S.) 84.

(*g*) 17 & 18 Vict. c. 125, s. 78; Chilton *v.* Carrington, 15 C. B. 730.

(*h*) 3 Bl. Com. p. 341.

(*i*) Ibid. p. 343.

(*k*) Gr. Coustumier, c. xxvi.

(*l*) 3 Bl. Com. 342, citing Exod. xxii. 10.

(*m*) King *v.* Williams, 2 Barn. & Cress. 538.

as the wager of law used to expose plaintiffs in detinue to great disadvantage, it had the effect of throwing that action almost entirely out of use, and introducing in its stead the action of *trover and conversion*, which last mentioned became therefore (and it still continues to be) the recognized and usual remedy for goods wrongfully detained.

This action of *trover* originally lay only for recovery of damages against such person as had *found* another's goods and wrongfully *converted* them to his own use; from which finding and converting it derived its name; but the freedom of the action from wager of law and some other technical considerations, gave it so considerable an advantage over the action of detinue, that, (by a fiction of law,) it was at length permitted to be brought against any man, who had in his possession, by any means whatsoever, the personal goods of another, and sold or used them, without the consent of the owner, or refused to deliver them over when demanded,—the fiction of law referred to being an allegation in the declaration that the plaintiff lost the goods, and that the defendant found them,—so as to bring the case within the proper scope of an action of *trover*. And this statement (which was matter of form only, and of which no proof was required) was inserted, although in fact the goods might never have been lost, and might have come to the defendant's possession in some other way, and not by finding; and these formal allegations were retained in use, until, by a provision in 15 & 16 Vict. c. 76, ("The Common Law Procedure Act, 1852,") they were directed for the future to be omitted: and it was then provided that the action might be sustained by showing, that the defendant wrongfully converted the goods to his own use, or wrongfully deprived the plaintiff of their use and possession (*n*). Indeed, it will be enough to prove, that the

(*n*) See 15 & 16 Vict. c. 76, s. 49, sched. (B.) 28; Munster *v.* The South Eastern Railway Company, 4 C. B. (N. S.) 679.

goods belonged to the plaintiff, and came to the defendant's possession, and that he refused or neglected, upon request, to deliver them up; for a refusal to deliver them on request, is, in itself, *primâ facie* sufficient evidence of a conversion (*o*); and indeed the right of action is not complete (in the case of mere detention) until there has been a demand and refusal (*p*).

3. The injury of dispossessing, or depriving another of his personal chattels, may be effected (as already observed) otherwise than by wrongful caption or detainer; and there are various torts,—or, in other words, various acts of unlawful commission or omission,—which, though widely differing from each other in their specific nature, are nevertheless reducible under this common head. Thus, I may be deprived either of goods or money from my having delivered over goods, or lent money, in consequence of a representation made by one person as to the circumstances or character of another; which representation, if it was untrue to the knowledge of the person by whom it was made, is an injury for which I may maintain an action against him (*q*); and the law is the same in the case of any other injury occasioned by the fraudulent misrepresentation of another (*r*),—as, for example, if he sells me an infected animal as a sound one (*s*). But such an action is essentially founded on the fraud or deceit of the party charged; and therefore it will not lie in any case where the representation, though untrue in fact, was made *bonâ fide* (*t*). And by Lord Tenterden's Act (9 Geo. IV. c. 14),

(*o*) 10 Rep. 56; Green *v.* Dunn, 3 Camp. 215 (n.); Rushworth *v.* Taylor, 8 Q. B. 699; Heald *v.* Carey, 11 C. B. 977; Burroughs *v.* Bayne, 5 H. & N. 296.

(*p*) Spackman *v.* Foster, 11 Q. B. D. 99.

(*q*) Foster *v.* Charles, 6 Bing. 396; 7 Bing. 105; Polhill *v.* Walter, 3 B. & Ad. 114.

(*r*) Pewtriss *v.* Austen, 6 Taunt. 522; Taylor *v.* Ashton, 11 Mee. & W. 401; Behn *v.* Kemble, 7 C. B. (N. S.) 260.

(*s*) Mullett *v.* Mason, Law Rep., 1 C. P. 559; Ward *v.* Hobbs, ib. 3 Q. B. 150.

(*t*) Haycraft *v.* Creasy, 2 East, 92; Smout *v.* Ilbery, 10 Mee. & W. 1; Ormrod *v.* Huth, 14 Mee. & W. 651; Collins *v.* Evans (in error), 5 Q. B. 820.

s. 6, no action shall be brought to charge any one by reason of his representation concerning the character, ability, or dealings of another, with the intent that such other person may obtain credit, money, or goods,—unless such representation be made in *writing*, and signed by the party to be charged therewith (*u*). Again, I may be deprived of money to which I am entitled under the judgment of a court of law, in consequence of the wrongful omission of the sheriff to seize the goods of the defendant, under the writ of execution which I have sued out upon the judgment; and in such case, my remedy is by action against the sheriff (*x*); the sheriff would now, however, in such a case be within the provisions of the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 29, and of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61).

4. Besides being deprived of the possession of his personal property, its owner may be injured also by its *abuse and damage:* as by hunting his deer; shooting his dogs; poisoning his cattle; or in anywise taking from the value of any of his chattels, or making them in a worse condition than before, by any of those modes of negligent or wilful mischief which are too obvious to require a more particular detail. And as personal property may, in some instances, be of an intangible or incorporeal nature,—as in the case of a copyright or patent right,—so there are injuries relating to these matters which properly fall under the present head, such as the piracy of a literary composition, or the infringement of a patent; and of a similar description is the injury committed by one manufacturer who sells his goods under the *trade mark* of another, even though the latter should have obtained no patent (*y*), and

(*u*) Haslock *v.* Fergusson, 7 Ad. & El. 86; Swan *v.* Phillips, 8 Ad. & El. 457; Pilmore *v.* Hood, 5 Bing. N. C. 97; Devaux *v.* Steinkeller, 6 Bing. N. C. 84; Tatton *v.* Wade, 18 C. B. 371; Swift *v.* Jewsbury, Law Rep., 9 Q. B. 301.

(*x*) Williams *v.* Mostyn, 4 Mee. & W. 145; Guest *v.* Elwes, 5 Ad. & El. 118.

(*y*) Sykes *v.* Sykes, 3 Barn. & Cress. 541; Burgess *v.* Hills, 26

whether he should or should not have registered his trade mark. And for an infringement of such rights as these, the plaintiff may by his action recover not only damages for the injury already suffered, but may also obtain an *injunction*, restraining the wrongdoer from the further invasion of the right; and in lieu of damages, he may (at his option) have an account of the profits derived from the wrongful sale, and obtain payment of the amount appearing due on such account (*z*).

Secondly, with regard to injuries affecting the right of things personal not in *possession*,—*i.e.*, things in *action* only; in other words, injuries affecting such rights as are founded in and arise from *contracts*, the nature and several divisions of which have been explained in the preceding volume (*a*). And it will be remembered, that contracts may be either under seal or by parol; verbal or written; expressed or implied: and they also comprise many individual species, the principal of which we had formerly occasion to consider in detail; and the action is brought for the *breach of contract* of whatever kind it be. It is expedient, therefore, now to advert shortly to some particular contracts of common occurrence, and to state the remedies for their breach:—

1. As regards the breach of *covenants in leases*, the remedy for either party is by action on the covenant. But there are exceptions to this; for in the case of a covenant to *pay rent*, the breach of it may be redressed either by action on the covenant or by action of debt; for in this case, the landlord having a claim to a liquidated sum of money, there arises between him and the tenant a debt in point of law; which debt he may demand, if he thinks proper, in lieu of the more general claim for damages in

Beav. 244; Leather Cloth Company *v.* American Leather Cloth Company, 11 H. of L. Ca. 523.

(*z*) Fox *v.* Hill, 2 De Gex & J. 353; Badische *v.* Levinstein, 24 Ch. Div. 156; Chatterton *v.* Cave, 3 App. Ca. 483.

(*a*) Vide sup. vol. II. pp. 59—147.

respect of the breach of covenant. For a freehold rent, indeed, viz. a rent issuing out of a freehold estate, whether of inheritance or for life, no action of debt lay, by the common law, during the continuance of the freehold out of which it issued (*b*); but by the statutes 8 Ann. c. 18, and 5 Geo. III. c. 17, such action may now be brought to recover freehold rents, if reserved on a lease for life only (*c*); and since the abolition of real actions by 3 & 4 Will. IV. c. 27, debt will also now lie for the recovery of a rent of inheritance; and presumably, therefore, also for arrears of a rent-charge or annuity, granted in fee, or in tail, or for life (*d*).

2. Under a contract of *sale* of goods the buyer may recover damages for non-delivery, the measure of the damages being the estimated loss directly and naturally resulting from the breach of contract (*e*); which estimated loss will (when there is a market for the goods) be *primâ facie* the difference between the contract price and the market price. And the buyer may also recover damages for breach of warranty, the measure of damages being again the estimated loss, which estimated loss is *primâ facie* the difference between the value of the goods at the time of the delivery and the value they would then have had if they had answered to the warranty (*f*). Also, if the action be brought for breach of contract to deliver specific goods, by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 52, repealing, but re-enacting with simplifications and amendments, the like provisions contained in the 19 & 20 Vict. c. 97, ss. 1, 2, upon the application of the plaintiff, the court may give judgment for the specific performance of the contract, that is, for the delivery of the specific goods, without giving the defendant the option of retaining them on payment of the damages for their non-delivery;

(*b*) 3 Bl. Com. 232.

(*c*) Ibid.

(*d*) Bac. Abr. Annuity and Rent-charge; Thomas *v.* Sylvester, Law Rep., 8 Q. B. 268; Searle *v.* Cooke, 43 Ch. D. 519.

(*e*) 56 & 57 Vict. c. 71, s. 51.

(*f*) Ibid. s. 53.

and upon such a judgment, execution may afterwards issue for the delivery of the specific goods sold; and, in default of delivery, the sheriff shall distrain the defendant by all his lands and chattels, until he deliver the goods,—a species of relief which is obtainable under the writ of delivery provided by the Judicature Acts (*g*). And on the other hand, if it is the buyer who breaks the contract of sale, the seller may have his action against him for the price of the goods sold (*h*); or (as the case may require) may recover damages against the buyer for his refusal to accept the goods sold, the measure of the damages being the estimated loss; which loss (when there is a market for the goods) will be *primâ facie* the difference between the contract price and the market price at the time when the goods ought to have been accepted (*i*).

3. With regard to a *loan of money*, we may take the opportunity of remarking, that there are in the nature of things other pecuniary claims analogous to that for *money lent*, which give rise to an action; viz. the claim for *money paid* by the plaintiff for the defendant at his request; for money *received* by the defendant, for the use of the plaintiff; and for money found to be due from the defendant to the plaintiff, upon an *account stated* between them (*k*). And it is often difficult (and usually unimportant) to determine, upon a given state of facts, into which of these claims the plaintiff's case properly resolves itself.

4. As to the contract of *partnership*, questions of account between partners are, as the general rule, settled in the course of an action in the Chancery Division of the High Court of Justice (*l*); and, (except by "action of

(*g*) Ord. xlviii. (1883), rr. 1, 2; App. H., No. 10.

(*h*) 56 & 57 Vict. c. 71, s. 49.

(*i*) Ibid., s. 50.

(*k*) The statements of causes of action referred to in the text have been usually designated as "the common (or *money*) counts." An *account stated* lies only where the plaintiff and defendant have come to an account, and a balance has been acknowledged; though the simple acknowledgment that a particular sum is due will be enough without any *further* accounting.

(*l*) The reader will bear in mind,

account," which in modern times has rarely come into use,) are not a proper subject for proceedings in the Queen's Bench Division. But an action may be brought in either Division by one partner against the other, on an express agreement to do or forbear from some particular act not involving a question of account (*m*); or on an agreement to pay a liquidated balance or the like (*n*); and though one partner cannot bring a legal action against another partner in the firm, for appropriating to his own exclusive use a chattel of the partnership, yet if one of the partners has destroyed such a chattel, it seems that the other may maintain such action in respect thereof (*o*).

5. As to the breach of a contract of *guarantee*, the remedy by the surety against the principal debtor, where the former has been compelled to make a payment under the guarantee, is for money paid by the former to the use of the latter; and any one of several co-sureties, who has paid more than his rateable proportion, is entitled to claim contribution from the other or others.

6. Upon *bonds*, the remedy of the obligee, in case of breach of contract by the obligor, is by action for the amount of the penalty; but, as stated in a former place, the plaintiff is allowed to recover no more upon a bond conditioned for the payment of money, than the principal sum due, (with interest and costs,) in respect of which it was given; nor upon a bond conditioned for the performance of any other act, more (in general) than shall be assessed by way of damages.

It is, moreover, to be understood, that besides things in action arising out of one or other species of contract, there

that the plaintiff may select, within certain limits, the Division in which he will bring his action; but the proceedings are in all cases subject to be *transferred* by order to another Division (Ord. xlix. (1883), r. 3).

(*m*) Bedford *v.* Button, 1 Bing. N. C. 391.

(*n*) Chit. Cont. 238; Smith *v.* Barrow, 2 T. R. 476.

(*o*) Co. Litt. 200 a, b; Bull. N. P. 34; Martyn *v.* Knowllys, 8 T. R. 145.

are some things in action which cannot properly be said to have that origin; but the withholding of which will nevertheless constitute an injury for which an action may be brought, viz. such debts as result from the obligation to pay money pursuant to a sentence of the law, or an enactment of the legislature: as when, in a court of law, judgment is obtained by one man against another, for a specific sum of money, which judgment becomes forthwith a *debt;* or when, by an Act of Parliament of that class called penal, a pecuniary forfeiture is inflicted for committing some specified offence, and made recoverable, as it often is, either by the Crown, or by the party aggrieved, or by a common informer; for just as an obligation or liability on an express contract to pay a specific sum of money constitutes a *debt*,—so the party who transgresses a penal statute immediately owes to the Crown, or to the party aggrieved, or to the common informer, (as the case may be,) the amount of the penalty. The remedy for the recovery of such judgment debt, or of such penal sum, when withheld, is by action on the judgment, or on the penal statute, respectively; and in the latter case, this remedy is generally designated as a penal action; or, where one part of the forfeiture is given to the Crown, and the other part to the informer, a *popular* or *qui tam* action, because it is brought by a person *qui tam* pro domino rege *quam* pro se ipso sequitur (*p*); but before suing for the penal sum, the plaintiff is sometimes required to have obtained the *fiat* of the Attorney-General (*q*).

Thirdly. *Injuries affecting Rights in Private Relations.*

This class of injuries may be considered as comprising such as may be done to persons under the four following relations,—husband and wife; parent and child; guardian and ward; and master and servant.

(*p*) Bradlaugh *v.* Clarke, 8 App. Ch. 354.

(*q*) 47 & 48 Vict. c. 74, s. 2.

I. [The injuries that may be offered to a man, considered as a *husband*, are principally three: *abduction*, or taking away his wife; *adultery*, or criminal conversation with her; and *beating* or otherwise abusing her.

And, first, *abduction*, may be either by fraud and persuasion, or by open violence; though the law in both cases supposes force and constraint, the wife having no power to consent; and therefore gives a remedy by action *de uxore raptâ et abductâ* (*r*).] This action lay at the common law; and thereby the husband shall recover, not the possession of his wife, but only damages for taking her away (*s*); and by the statute of Westminster the first (3 Edw. I.), c. 13, the offender may also be imprisoned for two years, and be fined at the pleasure of the Crown; so that, by the old law, both the Crown and the husband might have this action (*t*). The husband is, moreover, entitled to recover damages against any who persuade and entice his wife to live separate from him without a sufficient cause (*u*); and the old law was very strict in this particular; so much so that if one's wife missed her way upon the road, it was not lawful for another man to take her into his house, unless she was benighted, and in danger of being lost or drowned; but he might carry her behind him on horseback to market; or to a justice of the peace, for a warrant against her husband; or to the spiritual court, to sue for a divorce (*x*).

Adultery is not punishable by our law as a crime, its penal correction being left to the spiritual courts, which may proceed against the offender *pro salute animæ* (*y*); but considering it in another aspect, viz., as a civil injury, the law, as it stood up to a recent period, gave satisfaction for it to the husband, by an action for *criminal conversation*. In this action, the damages recovered were usually

(*r*) F. N. B. 89.
(*s*) 2 Inst. 434.
(*t*) 3 Bl. Com. p. 139; Inst. ubi sup.
(*u*) B. N. P. 78.
(*x*) Bro. Ab. tit. Trespass, 207, 213, 440.
(*y*) Vide sup. p. 343, n. (*z*).

increased or diminished by the circumstances of each particular case (*z*): as the rank and fortune of the plaintiff and defendant; the relation or connection between them; the degree and nature of the seduction employed; the previous behaviour and character of the wife; the manner in which she had been previously treated by the husband; the husband's obligation, by settlement or otherwise, to provide for children probably spurious; and so on (*a*). The damages would also be mitigated where the husband was proved to have been himself first guilty of conjugal infidelity (*b*); and if it appeared that he connived at or consented to his own dishonour (*c*), or lived, at the time of the adultery, in a state of absolute and permanent separation from his wife,—the action would be wholly barred (*d*). And this action could not be maintained, without proving a marriage in fact,—though, in other cases, reputation and cohabitation are, as the general rule, sufficient evidence of marriage (*e*). But the action for criminal conversation is now altogether abolished, and its place is supplied by a different form of proceeding (*f*),—it having been provided, by 20 & 21 Vict. c. 85, s. 33, that a husband may, by petition to the Court of Divorce established by that statute, claim *damages* from any person, on the ground of his having committed adultery with the wife of the petitioner (*g*); which petition is to be served on the alleged adulterer and the wife, unless the court shall dispense with such service, or direct some other service to be substituted; and the claim for damages is heard and tried on the same principles and according to the same rules as formerly applied to an action for criminal conversation. But the Act has also introduced the new principle, of giving power

(*z*) B. N. P. 26.
(*a*) 3 Bl. Com. 139.
(*b*) Bromley *v.* Wallace, 4 Esp. 237.
(*c*) Bennett *v.* Allcott, 2 T. R. 166.
(*d*) Weedon *v.* Timbrell, 5 T. R. 357.
(*e*) Morris *v.* Miller, Burr. 2057.
(*f*) 20 & 21 Vict. c. 85, s. 59.
(*g*) 36 & 37 Vict. c. 66, s. 34.

to the court to direct, after the verdict has been given, in what manner the damages shall be paid or applied; and to direct that the whole or a part shall be settled for the benefit of the children, (if any,) of the marriage, or as a provision for the maintenance of the wife (*h*); and this jurisdiction may be exercised in favour of the innocent party, although there are no children of the marriage (*i*); and the court may even allow alimony, upon special grounds, to the guilty wife (*k*); and proceedings of this nature now take place in the Divorce subdivision of the High Court of Justice, to which the jurisdiction of the Court of Divorce above mentioned has been transferred (*l*).

For the injury of *beating* a man's wife, or otherwise ill-using her, if it be a common assault, battery, or imprisonment, the law gives a remedy to recover damages in an action brought in the names of the husband and wife *jointly*: but if the beating or other maltreatment be very enormous (*per quod consortium amisit*), the law then gives the husband a *separate* remedy for this ill-usage; in which he must prove, by way of special damage, that he has thus lost the benefit of her society (*m*). The two claims may be joined in one and the same action (*n*).

II. With respect to the injury capable of being done to a man in the relation of *parent*, it seems to be now clearly established, that there is no instance in which an injury can be sustained by a parent in his merely parental character; and that in the case of a battery or other ill-treatment inflicted on a child, the action for redress must in general be brought in the name of the child himself, whether he have attained to his full age or not (*o*). There

(*h*) Keats *v.* Montezuma, 1 Swab. & Trist. 334; Pounsford *v.* Bulpin, 2 Swab. & Trist. 389; Bent *v.* Footman, ib. 392.

(*i*) 41 Vict. c. 19; Yglesias *v.* Yglesias, 4 P. D. 71.

(*k*) Browne's Divorce Pract., 2nd ed. p. 144.

(*l*) 36 & 37 Vict. c. 66, s. 34.

(*m*) Guy *v.* Livesay, Cro. Jac. 501; Hide *v.* Scyssor, ib. 538.

(*n*) 15 & 16 Vict. c. 76, s. 40; Order xviii. (1883), rr. 1, 3—5.

(*o*) Hall *v.* Hollander, 4 Barn. & Cress. 660.

are cases, indeed, in which the parent is entitled to sue in respect of misconduct towards the child; but as the right of suit attaches to him in all such instances, in the capacity of master, and not strictly in that of parent, the consideration of them belongs more properly to our fourth head.

III. [An injury may be done to a man as a *guardian*, by stealing or ravishing away his ward; for though guardianship in chivalry is now totally abolished, which was the only kind of guardianship beneficial to the guardian, yet the guardian in socage was always, and is still, entitled to an action of ravishment, if his ward, or pupil, be taken from him (*p*); but then he must account to his pupil, for the damages which he so recovers (*q*); and by the 12 Car. 2, c. 24, the testamentary guardian also has this remedy, subject to the like liability to account to his ward (*r*);] but a more speedy and summary method of redressing all complaints, relative to wards and guardians, is now obtained by an application to the Chancery Division of the High Court of Justice, which hath the superintendent jurisdiction of all the infants in the kingdom (*s*).

IV. [To the relation (and to the rights accruing from the relation) between *master and servant*, there are several species of injuries incident; *e.g.*, retaining a man's hired servant before his time is expired,—which is an illegal act; for every master has, by his contract, purchased for a valuable consideration the services of his domestics for a limited time: and the inveigling or hiring his servant, which induces a breach of this contract, is therefore an injury to the master; and for this injury the law has given him a remedy by action for damages (*t*); and he may also have an action against the servant for non-

(*p*) F. N. B. 139.
(*q*) Hale on F. N. B. 139.
(*r*) Eyre *v.* Countess of Shaftesbury, 2 P. Wms. 108.
(*s*) 36 & 37 Vict. c. 66, ss. 16, 34.
(*t*) Lumley *v.* Gye, 2 Ell. & Bl. 216; Evans *v.* Walton, Law Rep., 2 C. P. 615.

[performance of his agreement (*u*); but if the new master was not apprised of the former contract, no action lies against *him*, unless, indeed, he refuses to restore the servant upon demand (*x*). Another injury to this relation is that of beating, confining, or disabling the servant of another, so that he is not able to perform his work,—which depends upon the same principle as the last, viz., the property which the master has, by his contract, acquired in the labour of his servant;] and in this case, besides the action which the servant himself may have against the aggressor, the master also, as a recompense for *his* immediate loss, may maintain an action (*y*); [in which he must allege and prove the special damage he has sustained by the beating of his servant, *per quod servitium amisit* (*z*); and then the jury will make him a proportionable pecuniary satisfaction.] And it is in this manner alone, that, by our law, a parent is enabled to claim redress for a battery, or other ill-usage, inflicted on his child; or even for the seduction of his daughter;—viz., as a master; and, therefore, unless he is able to prove, that his child was in his service at the time the injury was committed, he is without remedy (*a*); from which it follows, that he is without remedy when the child resided, at the time, with another master,—though that master may himself maintain an action (*b*). But where a parent is plaintiff in a case of seduction, the courts incline to relieve him, as much as possible, from any difficulty connected with proof of the loss of service; considering the action as brought *in substance* to repair the outrage done to parental feeling,—and

(*u*) F. N. B. 167; Keane *v.* Boycott, 2 H. Bl. 511; Gunter *v.* Astor, 4 Moore, 12.

(*x*) F. N. B. 167; Winch, 51.

(*y*) Chamberlain *v.* Hazlewood, 5 Mee. & W. 515.

(*z*) 9 Rep. 113; 10 Rep. 130.

(*a*) Hall *v.* Hollander, 4 Barn. & Cress. 660; Blamire *v.* Hayley, 6 Mee. & W. 55; Davies *v.* Williams, 10 Q. B. 725; Manley *v.* Field, 7 C. B. (N. S.) 96; Evans *v.* Walton, Law Rep., 2 C. P. 615; Hedges *v.* Tagg, ib. 7 Exch. 283.

(*b*) Irving *v.* Dearman, 11 East, 24; Thompson *v.* Ross, 5 H. & N. 16.

it has been held, therefore, that, in such an action, the mere residence of the child with him at the time, affords sufficient proof that the relation of master and servant existed between them (*c*). Upon the same principle, too, the jury is directed, in assessing the damages, to take into account the dishonour done to the plaintiff, as well as the loss of service (*d*); and, indeed, the jurors are bound to pay attention to all such circumstances connected with the behaviour of any of the parties, as tend to affect the merits of the plaintiff's case; but, of course, no action for seduction can be maintained by the daughter herself—for *volenti non fit injuria.*

[Such then is the state of the law, (briefly considered,) with respect to injuries resulting from the violation of rights in private relations,—as to which it may be observed in general, that notice is only taken of the wrong done to the superior of the parties related, while the loss of the inferior is totally unregarded; *e.g.*, the wife cannot recover damages for the beating of her husband; and the child hath no property in his father or guardian (*e*); and the servant, whose master is disabled, does not thereby lose his maintenance or wages; and he has in fact no interest in his master personally considered.] We have seen, however, that, under Lord Campbell's Act (*f*), the widow or child may recover damages for the death of a husband or father; and the like damages for such death are recoverable under the Employers' Liability Act, 1880 (*g*).

(*c*) Jones *v.* Brown, 1 Esp. 217; Torrence *v.* Gibbens, 5 Q. B. 297; Rist *v.* Faux, 4 B. & Smith, 409; Terry *v.* Hutchinson, Law Rep., 3 Q. B. 599.

(*d*) Stark. Ev. part iv. p. 1309.

(*e*) Blackstone (vol. iii. p. 142) remarks, that the wife or child had nevertheless, if the husband or parent were slain, a peculiar species of *criminal* prosecution, called an *appeal*, a proceeding which was in force when Blackstone wrote, and was resorted to in the case of Ashford *v.* Thornton (1 Barn. & Ad. 405), and was afterwards abolished by 59 Geo. 3, c. 46.

(*f*) Vide sup. p. 408.

(*g*) Vide sup. vol. II. p. 239.

Fourthly. *Injuries affecting Public Rights.*

The only injuries that remain to be noticed are those sustained by a man in respect of his *public* rights; but this subject will not detain us long; for injuries of this description, between subject and subject, are in general of such a nature as to be remediable, not so much by action, as by indictment or information; or by some of those the prerogative writs, to which we shall have occasion to advert hereafter. Yet there are cases in which an action may be maintained in respect of the violation of a public right: as where special damage is sustained by an individual, in consequence of the obstruction of a highway (*h*): or where the returning officer at a parliamentary election refuses to receive the vote of an individual, so that the election takes place without his being allowed to exercise his elective right (*i*). In the latter of these cases, great difficulty was originally felt in entertaining the action,—it being urged against it, that the offence was a parliamentary one, and not properly cognizable out of parliament, and also that it involved no private injury that the law could take notice of; but it was ultimately adjudged, that an action lay at common law; since the law is supposed to give a remedy for every injury, and by this act of the returning officer, the plaintiff is deprived of the greatest privilege of a subject, viz. that of consenting to the laws by which he is bound; and it was further held, that the concurrent jurisdiction of parliament in the matter created no difficulty,—particularly as the very grievance which was the subject of complaint, was that the plaintiff was not properly represented there. A somewhat similar description of injury has been since provided for, by a positive enactment of the legislature; for, by 31 & 32 Vict. c. 125 (commonly called the Parliamentary Elections Act, 1868),

(*h*) Wilkes *v.* Hungerford Market, 2 Bing. N. C. 281.

(*i*) Ashby *v.* White, Ld. Raym. 938; Pryce *v.* Belcher, 3 C. B. 58; 4 C. B. 866.

s. 48, which re-enacts a like provision contained in the 11 & 12 Vict. c. 98, s. 102, "if any returning officer shall "wilfully delay, neglect, or refuse, duly to return any "person who ought to be returned to serve in parliament "for any county or borough, such person may, in case it "has been determined on the hearing of an election peti- "tion under the Act that such person was entitled to have "been returned, sue the officer and recover double the "damages he shall sustain by reason thereof, together "with full costs of suit; provided such action be com- "menced within one year after the commission of the act "on which it is grounded, or within six months after the con- "clusion of the trial relating to such election." But regarding this action, and generally regarding all actions brought against public officers, in respect of any alleged breach or failure of duty on their parts, it has been now provided, by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), that the action is to be commenced within six months; and (if the action be for damages), then tender of amends before action, or tender or payment into court after action, or any undue haste in the plaintiff in commencing his action whereby tender of amends before action was prevented, will in general have this effect, namely, that if the plaintiff lose the action, he will have to pay the defendant's costs between solicitor and client; and if he succeed in the action, he will, in general, obtain only his costs up to the date of payment into court, paying in that case the defendant's subsequent costs as between solicitor and client.

CHAPTER IX.

OF EQUITY IN ITS RELATION TO LAW.

It has been already stated, that equity has, from an early time, constituted a large and important portion of our juridical system—distinct from and suppletory of the common law, and which for a long period of our history, and indeed until quite recently, was administered in its own peculiar courts. [The terms, a court of *equity*, and a court of *law*, suggest, indeed, a contrast with each other; but it is not therefore to be presumed that the one judged without equity or that the other was not bound by the law;] and in fact [every definition or illustration to be met with, which would draw a line between the two jurisdictions, by setting law and equity in opposition to each other,—will be found either totally or in great part erroneous.

1. Thus, in the first place, it is said, that in England it is the business of equity to abate the rigour of the common law (*a*); and there have been in fact some few instances of its exercising this kind of interposition. But, in general, equity contends for no such power; for however hard was the case of bond creditors, whose debtor devised away his real estates, and rigorous and unjust the rule which put the devisee in a better position than the heir, still equity did not interpose. Hard also were the rules of the common law, that land descended or devised

(*a*) 3 Bl. Com. p. 430; Lord Kaims, Prin. of Eq. 44.

[should not be liable to a simple contract debt of the ancestor or devisor—even though such debt were for the money by which the very land had been purchased: that the father should not succeed to the real estate of the son, as his heir: and that lands should descend to a remote relation of the whole blood—or even escheat to the lord—in preference to the owner's half-brother; and yet no relief from any of these severities,—though the artificial reasons for them, which arose from feudal principles, had long ago entirely ceased,—was ever afforded in equity; for in all cases of positive law, equity, as well as law, must say with Ulpian, "*Hoc quidem perquam durum est, sed ita lex scripta est*" (*b*).

2. Again: it is said, that equity determines according to the spirit of the rule, and not according to the strictness of the letter (*c*); but so also does law; for instance, both are equally bound, and equally profess, to interpret statutes according to the true intent of the legislature. In general law, all cases cannot be foreseen; and some cases may arise that will fall within the meaning, though not within the words of the legislature, or *vice versâ;* and with reference to these, they are sometimes said to fall within, or to be *out* of, the *equity* of the Act of Parliament,—meaning by equity as thus used nothing but the sound interpretation of the law. These, then, are the cases which, as Grotius says, "*lex non exactè definit, sed arbitrio boni viri permittit,*" in order to find out the true sense and meaning of the lawgiver from every other canon of construction (*d*); but there is not a single rule of interpreting a statute that is not equally used both at law and in equity; the construction must in both be the same,—each endeavouring to fix and adopt the true sense of the enactment in question, and neither being able to enlarge, diminish, or alter that sense, in a single tittle.

(*b*) Ff. 40, 9, 12. 177.
(*c*) Lord Kaims, Prin. of Eq. (*d*) De Æquit. s. 3.

[3. But it hath been said, that *fraud*, and *accident*, and *trust*, are the proper and peculiar objects of equity (*e*); and yet every kind of *fraud* is equally cognizable, and equally adverted to, at law; and many *accidents* are also relieved against at law;—as loss of deeds, mistakes in receipts or accounts, wrong payments, deaths (which make it impossible to perform conditions literally), and a multitude of other contingencies: and some cannot be relieved, even in equity; as, for example, the accident of a devise ill executed, or certain covenants in leases omitted to be performed. A technical *trust*, indeed, created in land by the limitation of a second use, was forced into the jurisdiction of equity in the manner formerly mentioned;] and this species of trust still remains as a kind of *peculium* in the Chancery Division of the High Court of Justice; [but still there are trusts which are (and always were) cognizable at law, as deposits and all manner of bailments; and especially that implied contract (so highly beneficial and useful) of having undertaken to account for money received to another's use.

4. Once more: it hath been said, that equity is not bound by rules or precedents, but acts from the opinion of the judge, founded on the circumstances of every particular case (*f*); whereas, in truth, our system of equity is a laboured connected system, governed by established rules, and bound down by precedents, from which it does not depart, although the reason of some of them may perhaps be liable to objection (*g*). The erroneous opinion entertained of equity,—an opinion adopted and propagated (though not with approbation) by our principal antiquaries

(*e*) 1 Roll. Abr. 374; 4 Inst. 84; Earl of Bath *v.* Sherwin, 10 Mod. 1.

(*f*) Selden (Table Talk, tit. Equity) says: "For *law* we have a measure, and know what to trust to; *equity* is according to the conscience of him that is chancellor; and is according to the measure of the chancellor's foot. What an uncertain measure!"

(*g*) Foster *v.* Munt, 1 Vern. 473 (with regard to the undisposed of *residuum* of personal estates).

[and lawyers (*h*),—was perhaps excusable in the infancy of our courts of equity, before their jurisdiction was settled, and when the chancellors themselves,—partly from their ignorance of law (being frequently bishops or statesmen), partly from ambition and lust of power (encouraged by the arbitrary principles of the age they lived in), but principally from the narrow and unjust decisions of the courts of law,—had arrogated to themselves such unlimited authority, as was totally disclaimed by their successors, from the close of the seventeenth century. The decrees of a court of equity were in those early times rather in the nature of awards, formed *pro re natâ*, with more probity of intention than regard for technicality, and founded on no settled principles, as being never designed for precedents; but the systems of jurisprudence, both at law and in equity, are now equally fixed or positive systems; the one being originally derived from the feudal customs as they prevailed in different ages in the Saxon and Norman judicatures; the other, from the imperial and pontifical formularies introduced by the clerical chancellors.]

These two systems are also now in strict accordance with each other, as to the *principles* on which they proceed; and the maxim generally applicable to the subject has always been, that *equity follows the law.* Some instances to the contrary indeed have always existed;—as where a manifestly harsh and unreasonable rule having been maintained at law, owing to a want of proper liberality and expansion in the views of the judges, relief has been afforded from it by equity. [Thus, the penalty of a bond was very pardonably considered as the real debt in the courts of law, when the debtor neglected to perform his agreement for the return of the loan *with interest;* for the judges could not, as the law then stood, give judgment

(*h*) Archeion, 71, 72, 73; De Augm. Scient. l. 8, c. 3; Table Talk, tit. Equity; Gloss. 108.

[that the interest should be specifically paid; and even afterwards, when the taking of interest became legal as the necessary companion of commerce, and when the statute of 37 Hen. VIII. c. 9 had declared the debt or loan itself to be "the just and true intent" for which the obligation was given, the courts of law still adhered to the letter of the antient precedents, and refused to consider the payment of principal, interest, and costs as a full satisfaction of the bond; and it was reasonable therefore, that the courts of equity should construe the instrument according to its "just and true intent," as merely a security for the loan, in which light it was certainly understood by the parties, and therefore this construction came to be universally received. So in mortgages (which are only a real, as the other is a personal, security for the money lent), the payment of principal, interest, and costs ought at any time, before judgment executed, to have saved the forfeiture in a court of law, as well as in a court of equity; and the inconvenience, as well as the injustice, of putting different constructions in different courts, upon one and the same transaction, obliged parliament at length to interfere, and to direct, by the statutes 4 & 5 Anne, c. 3, and 7 Geo. II. c. 20, that, in cases of bonds and mortgages, that which had long been the practice of the courts of equity, should also for the future be universally followed in the courts of law; wherein, indeed, it had before these statutes in some degree obtained a footing (*i*).]

But notwithstanding these particular exceptions, the maxim, that equity follows the law, long remained the general rule; and indeed, at the present time, the rules of property, the rules of evidence, and the rules of interpretation, are, or ought to be, the same under both systems. [Thus, neither equity, nor law, can vary men's wills or agreements; or, (in other words,) make wills or agreements for them; both are to understand them truly, and

(*i*) Stern *v.* Vanburgh, 2 Keb. 553, 555; Elliott *v.* Callow, Salk. 597.

[therefore both of them uniformly; one system cannot extend, nor the other abridge, a lawful provision deliberately settled by the parties, contrary to its just intent. Equity, again, no more than law, can relieve against a penalty in the nature of stated damages,—as a rent of 5*l.* an acre for ploughing up antient meadow (*k*); nor against a lapse of time, where the time is of the essence of the contract, —as in covenants for the renewal of leases (*l*). Both systems equitably construe, but neither pretends to control or change, a lawful stipulation or agreement;] and upon this principle, where the subject-matter of the action before them is such as requires to be determined *secundùm æquum et bonum*, according to what is just and right under the special circumstances of the case, the judgments of our courts of law were always guided by the most liberal equity. [In matters of positive right, on the other hand, both law and equity must submit to and follow those antient and invariable maxims, "*quæ relicta sunt et tradita*" (*m*). Therefore both follow the law of nations, and collect it from history and the most approved authors of all countries, where the question depends upon that law,— as in the case of the privileges of ambassadors. In mercantile transactions, also, both follow the maritime law, and argue from the usages and authorities received in all maritime countries; and in matters originally of ecclesiastical cognizance, both equally adopt the canon or imperial law, according to the nature of the subject; and if a question came before either, which was properly the object of a foreign municipal law, they would both receive information as to what was the rule of the country, and would both decide accordingly (*n*).]

It must, however, be admitted that equity and law, as

(*k*) Aylett *v.* Dodd, 2 Atk. 239; French *v.* Macale, 2 Dr. & W. 274.

(*l*) Nicholson *v.* Smith, 22 Ch. Div. 640.

(*m*) "*De jure naturæ, cogitare per nos atque dicere debemus; de jure populi Romani, quæ relicta sunt et tradita.*"—Cic. de Leg. 1, 3, *ad calc.*

(*n*) Phil. on Ev. vol. ii. p. 144.

administered previously to the recent changes, were not, in the exercise of their concurrent jurisdiction, consistent in some things, so that the abuse occasionally arose, that a different rule obtained, according as the remedy of the suitor was at law or in equity: and the framers of the Judicature Acts, therefore, seized the occasion of the union of the several courts, whose jurisdiction was thereby transferred to the High Court of Justice, to amend and declare the law to be administered in England, as to certain matters respecting which such discrepancy existed; and accordingly these Acts have declared (among other changes of minor importance), that for the future, 1. An estate for life without impeachment of waste shall not be deemed to have conferred upon a tenant for life any *legal* right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate. 2. There shall not be any merger, by operation *of law* only, of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity. 3. A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land, as to which the mortgagee shall have given no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, *in his own name* only,—unless the cause of action arises upon a lease or other contract made by him jointly with some other person. 4. Any absolute assignment by writing under the hand of an assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom such assignor would have been entitled to receive or claim such debt or chose in action—shall be effectual in law (subject to all equities which would have been entitled

to priority over the right of the assignee if those Acts had not passed) to transfer the *legal* right thereto from the date of such notice, together with all legal and other remedies for the same; and the power to give a good discharge for the same, without the concurrence of the assignor, subject, nevertheless, to this proviso, that if the debtor, trustee, or other person liable in respect of such debt or chose in action, shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claim to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same; or he may, if he think fit, pay the same into the High Court of Justice, under the Trustee Act, 1893. 5. Any stipulations in a contract which, before the Acts, would not have been deemed in a court of equity to be, or to have become, of the essence of such contract, shall receive in all courts the same construction and effect as they would have theretofore received *in equity*. 6. An injunction may be granted, whether the estates claimed by both or by either of the parties are *legal* or are *equitable*. 7. In questions relating to the custody and education of infants, the rules of *equity* shall prevail over those formerly laid down by the courts of *law*. 8. And, generally, in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of *equity* shall prevail (*o*).

Such, then, being the parity of law and reason which governs both systems, wherein (it may be asked) does their essential difference consist? And to this, the answer is, that the difference principally consists in the subjects over which they exercise jurisdiction; in the kind of relief they administer; and in the modes of proceeding they

(*o*) 36 & 37 Vict. c. 66, s. 25; et vide pp. 353, 354, supra.

pursue respectively (*p*). For firstly, as to the subjects of jurisdiction, — The jurisdiction in equity having been originally introduced to mitigate certain severities and to supply certain defects existing in the common law, and from which relief could not otherwise be obtained, such jurisdiction is consequently to be considered as in the nature of a supplement only, (however valuable and extensive,) to the proper and antient scheme of judicature; and some general idea of the nature of equitable business, falling within such supplementary jurisdiction, may be gained from that provision of the Judicature Acts which specifically assigns to the Chancery Division of the High Court of Justice the following causes and matters:— 1. The administration of the estates of deceased persons; 2. The dissolution of partnerships, or the taking of partnership or other accounts; 3. The redemption or foreclosure of mortgages; 4. The raising of portions, or other charges on land; 5. The sale and distribution of the proceeds of property subject to any lien or charge; 6. The execution of trusts, charitable or private; 7. The rectification, or setting aside, or cancellation of deeds or other written instruments; 8. The specific performance of contracts between vendors and purchasers of real estates, including contracts for leases; 9. The partition or sale of real estates; and 10. The wardship of infants and the care of infants' estates (*q*). But the above subjects did not include the whole of the jurisdiction which it was proposed to transfer to the High Court of Justice from the Court of Chancery, and therefore the Judicature Acts proceed further to assign to it "all causes and matters" taken under any Act of Parliament whereby exclusive jurisdiction in respect thereof has been given to the Court of Chancery, or to any judge or judges thereof; and consequently the jurisdiction of the Chancery Division of the High Court of Justice naturally divides itself into two parts:—The

(*p*) Wykham *v.* Wykham, 18 Ves. jun. 415; Clarke *v.* Parker, 19 Ves. jun. 21, 22.

(*q*) 36 & 37 Vict. c. 66, s. 34.

first consisting of that which it derives from the transfer to it of the several specific matters above enumerated, all of which arose out of the gradual growth of equitable jurisdiction since its original establishment in this kingdom; and the other being that which it derives from a variety of miscellaneous enactments, which conferred exclusive jurisdiction, in divers causes and matters, on the former Court of Chancery (*r*).

(*r*) See (among other statutes) *Burial Acts* (15 & 16 Vict. c. 85; 16 & 17 Vict. c. 134; 17 & 18 Vict. c. 87; 18 & 19 Vict. c. 128; 20 & 21 Vict. c. 81; 22 Vict. c. 1; 23 & 24 Vict. c. 64; 25 & 26 Vict. c. 100; 34 & 35 Vict. c. 33). *Cestui que vie, production of* (6 Ann. c. 72, otherwise c. 18). *Charitable Trusts Acts* (16 & 17 Vict. c. 137; 18 & 19 Vict. c. 124; 32 & 33 Vict. c. 110). *Charitable Uses Acts* (51 & 52 Vict. c. 42; 54 & 55 Vict. c. 73). *Charitable Trustees Incorporation Act*, 1872 (35 & 36 Vict. c. 24). *Church Building Amendment Act* (8 & 9 Vict. c. 70). *The Companies Acts*, 1862 to 1890 (25 & 26 Vict. c. 89; 30 & 31 Vict. c. 131; 33 & 34 Vict. c. 104; 40 & 41 Vict. c. 26; 42 & 43 Vict. c. 76; 43 & 44 Vict. c. 19; and 53 & 54 Vict. cc. 62, 63, 64). *The Copyhold Acts* (4 & 5 Vict. c. 35; 15 & 16 Vict. c. 51; 21 & 22 Vict. c. 94; 50 & 51 Vict. c. 73; and now 57 & 58 Vict. c. 46). *Conveyancing Acts*, 1881, 1882, and 1892 (44 & 45 Vict. c. 41; 45 & 46 Vict. c. 39; 55 & 56 Vict. c. 13). *The Custody of Infants* (36 & 37 Vict. c. 12; 49 & 50 Vict. c. 27; 54 Vict. c. 3). *Defence Acts* (5 & 6 Vict. c. 94; 18 & 19 Vict. c. 117; 22 & 23 Vict. c. 21; 23 & 24 Vict. c. 112; 27 & 28 Vict. c. 89). *Debts and Liabilities*, Sir George Turner's Act (13 & 14 Vict. c. 35; 23 & 24 Vict. c. 38). *Ecclesiastical Estates Acts* (5 & 6 Vict. c. 26; 14 & 15 Vict. c. 104). *Fines and Recoveries, Abolition of* (3 & 4 Will. 4, c. 74). *Grammar Schools* (3 & 4 Vict. c. 77). *Inclosure Act*, 1845 (8 & 9 Vict. c. 118). *Judgments, Sale of Lands under* (27 & 28 Vict. c. 112). *Land, Improvement of* (27 & 28 Vict. c. 114; 45 & 46 Vict. c. 38). *Lands Clauses Consolidation*, 1845 (8 & 9 Vict. c. 18). *Legacy Duty* (36 Geo. 3, c. 52; and now 56 & 57 Vict. c. 53). *Merchant Shipping* (57 & 58 Vict. c. 60). *Mortgage Debentures* (28 & 29 Vict. c. 78; 33 & 34 Vict. c. 20). *Married Women's Property* (33 & 34 Vict. c. 93; 45 & 46 Vict. c. 75; 56 & 57 Vict. c. 63). *Metropolitan Board of Works (Loans) Act* (32 & 33 Vict. c. 102, s. 40; 51 & 52 Vict. c. 41). *Municipal Corporations* (45 & 46 Vict. c. 50). *National Debt Acts*, 1870 *and* 1884 (33 & 34 Vict. c. 71, and 47 & 48 Vict. c. 23); and *Redemption and Conversion Acts* (51 & 52 Vict. cc. 2, 15; and 52 & 53 Vict. cc. 4, 6). *Parliamentary Deposits Act* (9 & 10 Vict. c. 20). *Petition of Right Act* (23 & 24 Vict. c. 34). *Partition Acts* (31 & 32 Vict. c. 40; 39 & 40 Vict. c. 17). *Patents, Designs, &c.* (46 & 47 Vict. c. 57;

Secondly, as to the kinds of relief administered in the Chancery Division.—And here we can but refer, in the most general way, to the relief given to lessees in the case of leases under powers defectively executed (*s*); and to the relief given to purchasers and creditors, and to wives, children, and charities, in the case of powers of appointment defectively executed (*t*); and to the relief (by way of rectification) given in the case of mistakes in settlements and the like, including even disentailing deeds (*u*). But we shall notice, with some little particularity, the following four species of equitable relief, namely, 1st, where the Court of Equity protects and enforces the execution of trusts; 2ndly, where it enforces the specific performance of contracts; 3rdly, where it grants an injunction; and 4thly, where it lends its aid to perpetuate testimony.

1st. The origin and nature of *trusts* have been stated under a former division of this work (*v*). In the present place, we have further to remark, that, for the protection and enforcement of trusts, the means are in general either by an action, or by petition in equity, praying such relief as the circumstances of the case require; such as that of

48 & 49 Vict. c. 63; and 51 & 52 Vict. c. 50). *Settled Estates* (40 & 41 Vict. c. 18). *Settled Land* (45 & 46 Vict. c. 38; 47 & 48 Vict. c. 18; 53 & 54 Vict. c. 69). *Land Tax, Redemption* (42 Geo. 3, c. 116; 16 & 17 Vict. c. 117). *Trade Marks Registration* (38 & 39 Vict. c. 91; 39 & 40 Vict. c. 33; 40 & 41 Vict. c. 37). *Trustee Acts*, 1850 *and* 1852 (13 & 14 Vict. c. 60; 15 & 16 Vict. c. 55); *Trustee Act*, 1888 (51 & 52 Vict. c. 59); and *Trustee Acts*, 1893 *and* 1894 (56 & 57 Vict. c. 53; 57 & 58 Vict. c. 10); repealing, but (in effect) re-enacting the *Confirmation of Sales Act* (25 & 26 Vict. c. 108); and the *Trustee Relief Acts* (10 & 11 Vict. c. 90; and 12 & 13 Vict. c. 74). *Trustees Relief and Law of Property Amendment* (22 & 23 Vict. c. 35; 23 & 24 Vict. c. 38); and *Vendors and Purchasers* (37 & 38 Vict. c. 78).

(*s*) 12 & 13 Vict. cc. 26, 110; 13 & 14 Vict. c. 17.

(*t*) Lucena *v.* Lucena, 5 Beav. 249; Garth *v.* Townsend, Law Rep., 7 Eq. 220; and see (as to *illusory* appointments and *non-exclusive* powers generally) 11 Geo. 4 & 1 Will. 4, c. 46; and 37 & 38 Vict. c. 37.

(*u*) Hall Dare *v.* Hall Dare, 31 Ch. D. 251.

(*v*) Vide sup. vol. I. p. 356.

compelling the trustee to account for trust money received (*x*) ; or compelling the sale of the trust property, and a due application of the sale-proceeds under the direction of the court ; or setting aside dispositions of trust property made in breach of trust, and with knowledge of the trust, on the part of the purchaser as well as the trustee (*y*) ; or appointing new trustees, either in substitution for or in addition to the existing ones. And we ought more particularly to mention proceedings for the *administration of assets*,—involving the payment of debts and legacies, and the distribution of residues, out of the estates, (whether legal or equitable,) of deceased persons, including the due *marshalling* of the assets so as to ensure as far as may be the payment of all the beneficiaries in full (*z*); and the passing of the accounts of such estates,—which proceedings may be instituted either by a creditor, legatee, or next of kin ; or even by the personal representative himself, when disinclined to undertake the sole responsibility of administering the assets (*a*) ; all which proceedings wholly belong to the province of equity, as in a legal action effect only is given to the claim of the particular suitor (whether creditor or legatee), without ever undertaking a general distribution of the assets (*b*). And it forms one of the provisions of the Judicature Acts, that, in the administration of the assets of any person who may die after those statutes came into operation and whose estate may prove to be insufficient for the payment in full of all his debts and liabilities—and in the winding up of any company under the Companies Acts, 1862 to 1890, whose assets may prove insufficient for the payment of the company's debts and liabilities and the costs of winding up,—the same rules shall prevail and be observed, as to the

(*x*) Bostock *v.* Floyer, Law Rep., 1 Eq. Ca. 26 ; Budge *v.* Gummow, ib., 7 Ch. App. 719.

(*y*) Tate *v.* Williamson, Law Rep., 1 Eq. Ca. 528.

(*z*) Spence, Eq. Jur. vol. ii. 826 ; Ram on Assets, chap. xxviii.

(*a*) 15 & 16 Vict. c. 86, ss. 45—47 ; Order lv. (1883).

(*b*) Doe *v.* Guy, 3 East, 123 ; 2 Saund. by Wms. 137 (*c*), 6th edit.

respective rights of secured and unsecured creditors, and as to the debts and liabilities provable, and as to the valuation of annuities and future or contingent liabilities respectively, as may be in force for the time being under the *law of bankruptcy*, with respect to the estates of persons adjudged bankrupt (*c*).

The legislature during the present reign has been unusually active in its provisions on the subject of trusts. Thus, by the Trustee Relief Act, 1847, (10 & 11 Vict. c. 96,) now repealed, its provisions being however re-enacted, by the Trustee Acts, 1893 and 1894 (56 & 57 Vict. c. 53, and 57 & 58 Vict. c. 10), all trustees, executors, administrators, or other persons having in their hands moneys belonging to *any trust*, are enabled to pay over the same, with the privity of the paymaster-general, to the Bank of England, (or to transfer any stock or government securities standing in their names into the name of such paymaster-general,) in trust to attend the orders of the court; and the receipt given shall be a sufficient discharge to the trustees or other person for the moneys so paid, or stocks or securities so transferred. Also, by Lord St. Leonards' Act (22 & 23 Vict. c. 35), ss. 26, 30, and 31, and Lord St. Leonards' Act Amendment Act, (23 & 24 Vict. c. 38,) s. 9, all which sections have now been repealed by the Trustee Act, 1893, the like provisions being thereby or otherwise enacted in lieu thereof, no trustee, executor, or administrator making any payment, or doing any act *bonâ fide* under a power of attorney, shall be liable for what is so done, by reason that the person who gave the power was dead at the time of such payment or act, or had done some act to avoid the power (*d*); and any trustee, executor, or administrator,

(*c*) 38 & 39 Vict. c. 77, s. 10.

(*d*) And see also 44 & 45 Vict. c. 41, ss. 46—48, and 45 & 46 Vict. c. 39, ss. 8, 9, which make this provision general, and also provide for the power of attorney being made irrevocable either generally or for a specified time not exceeding one year.

may apply to an equity judge at chambers, for his opinion or direction respecting the management or administration of the trust property or the assets; and by acting on such opinion or direction, shall be deemed, so far as regards his own responsibility, to have discharged his duty; and every instrument creating a trust, either expressly or by implication, shall be deemed to contain a clause to the effect following, viz. that the trustees or trustee shall be chargeable only for what they shall respectively actually receive, notwithstanding their signature of any receipt for the sake of conformity; and shall be answerable only for their own acts and neglects, and not for those of each other, nor for any person with whom any trust fund may be deposited, nor for any deficiency of any securities, unless through their own wilful default; and also that it shall be lawful for them to reimburse themselves, out of the trust premises, all expenses incurred in the execution of the trusts. And further, by Lord Cranworth's Act (23 & 24 Vict. c. 145), ss. 1—7, but which Act was not retrospective, it was provided, that in all cases where, by any instrument of settlement, it was expressly declared that trustees or other persons therein indicated should have a power of sale over any hereditaments, it should be lawful for such trustees or other persons, whether such hereditaments were vested in them or not, to exercise such power of sale, by selling the same, either together or in lots, and either by auction or by private contract; and although this Act has been repealed, in part, by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), and as to the rest, by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), more comprehensive provisions to the same effect have been enacted by the 35th and 66th sections of the Conveyancing Act, 1881; and these last mentioned provisions are retrospective.

It was also provided by Lord Cranworth's Act, that trustees, with trust money in their hands, which it was their duty to invest at interest, might, in their discretion, invest the same in any of the securities in the Act speci-

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fied (*e*),—which was an extension of the range of investments for trust moneys authorized by Lord St. Leonards' Act (*f*), and Lord St. Leonards' Act Amendment Act (*g*); and also, that trustees might provide out of the trust funds, for the maintenance and education of infant *cestuis que trustent;* and the same Act contained various other provisions, as for the appointment of new trustees in the event of any

(*e*) 23 & 24 Vict. c. 145, s. 25.

(*f*) 22 & 23 Vict. c. 35, s. 32.

(*g*) 23 & 24 Vict. c. 38, ss. 10, 11, which empowered the Lord Chancellor (with the assistance of the other equity judges) to make orders from time to time as to the investment of cash under the control of the court; and it was enacted, that it should be lawful for trustees, executors, and administrators having power to invest their trust funds on government securities or upon parliamentary stocks, funds, or securities, to invest their trust funds in the same way. And, accordingly, an Order issued, under which "*cash under the control of the court*" might be invested in, 1. The consolidated £3 per cent. annuities. 2. Reduced £3 per cent. annuities. 3. New £3 per cent. annuities. 4. Bank stock. 5. East India stock. 6. Exchequer bills. 7. £2 : 10*s.* per cent. annuities. 8. On mortgage of freehold or copyhold estates in England or Wales. And now by Order xxii. rule 17 (November, 1888), cash under the control of the court may be invested in the following stocks, funds, or securities :—1. Two and three-quarters per cent. consolidated stock (to be called after the 5th of April, 1903, two and a half per cent. consolidated stock). 2. Consolidated £3 per cent. annuities. 3. Reduced £3 per cent. annuities. 4. £2 : 15*s.* per cent. annuities. 5. £2 : 10*s.* per cent. annuities. 6. Local loans stock under the National Debt and Local Loans Act, 1887. 7. Exchequer bills. 8. Bank stock. 9. India three and a half per cent. stock. 10. India three per cent. stock. 11. India guaranteed railway stocks or shares, provided, in each case, that such stocks or shares shall not be liable to be redeemed within a period of fifteen years from the date of investment. 12. Stocks of colonial governments guaranteed by the Imperial Government. 13. Mortgage of freehold and copyhold estates respectively in England and Wales. 14. Metropolitan consolidated stock, £3 : 10*s.* per cent. 15. Three per cent. Metropolitan consolidated stock. 16. Debenture preference guaranteed or rent-charge stocks of railways in Great Britain or Ireland having, for ten years next before the date of investment, paid a dividend on ordinary stock or shares. 17. Nominal debentures or nominal debenture stock under the Local Loans Act, 1875, provided, in each case, that such debentures or stock shall not be liable to be redeemed within a period of fifteen years from the date of investment.

trustees dying or becoming unfit to act, or being desirous of being discharged from acting (*h*);—and also making the receipts in writing of any trustees, for money payable to them as trustees, sufficient discharges, and effectually exonerating the party paying, without his being required to see to the application thereof,—all which enactments of the said repealed Act have been re-enacted, and made more comprehensive and also retrospective by the Conveyancing Act, 1881, and the Settled Land Act, 1882, before mentioned.

Lastly, by the Trustee Act, 1888 (*i*), by way of relieving trustees (not being fraudulent or culpable) from certain rules of the Chancery Division which the legislature thought bore too hardly upon them, it was provided, that they might in certain cases authorize their solicitor to receive the trust moneys (s. 2); and might also authorize their solicitor or any banker to receive any policy moneys subject to the trust (s. 2); and might sell under proper conditions of sale, without any fear of being thereafter made liable for the conditions of sale being deemed depreciatory (s. 3); and might lend trust funds to the extent of two-thirds the value of the security as reported to them by a valuer (s. 4); and should be protected to the extent of the amount so lent, and liable only for the excess beyond such amount (s. 5); and should be entitled, as against married women (although restrained from anticipation), equally as against other *cestuis que trustent*, to impound their beneficial interests to make good the breach of trust (s. 6); and might insure buildings to the extent of three-fourths their value (s. 7); and might plead the Statutes of Limitation as a protection against liability for breaches of trust of a merely technical character (s. 8); and might (if authorized to invest on real securities) invest in the security of long terms of years not being onerous

(*h*) In re Tempest, Law Rep., 1 Ch. Ap. 485.

(*i*) 51 & 52 Vict. c. 59.

leaseholds (s. 9); and might renew renewable leaseholds (s. 10); and might raise the moneys necessary for such renewals, by mortgage of the trust premises (s. 11),—all which provisions were made retrospective (s. 12); but they were not to authorize any trustee to do what he was expressly forbidden by the trust instrument to do, or to omit to do what he was thereby expressly required to do (s. 12). But all the provisions of the Trustee Act, 1888, above summarized, save only the provision regarding the Statutes of Limitations, have now been repealed by the Trustee Act, 1893 (*k*); and they have at the same time been re-enacted by the last mentioned Act, which is a Consolidation Act.

2ndly. The Court of Chancery exercises also the jurisdiction of *decreeing the specific performance of agreements*, instead of giving redress for their non-performance by way of damages,—and this on the ground that, in equity, that which ought to be done shall be considered as being actually done, and at the time when it ought to have been done originally; and this is a jurisdiction which that court is said to have assumed as early as the time of Edward IV. (*l*). This mode of relief, indeed, is confined, generally speaking, to contracts regarding lands, it not being the ordinary practice in equity to enforce the specific performance of agreements relating to personalty, for the breach of these latter may in general be adequately redressed by an award of damages (*m*). But contracts for the purchase of land or the like (including contracts for leases) will be decreed to be specifically performed (*n*); and (under particular circumstances) even covenants to execute disentailing deeds will be specifically enforced (*o*); and in all cases of an agreement for the sale and purchase of land, though

(*k*) 56 & 57 Vict. c. 53, amended by the 57 & 58 Vict. c. 10.

(*l*) 1 Mad. Chan. p. 361.

(*m*) Mortlock *v.* Buller, 10 Ves. jun. 315.

(*n*) 36 & 37 Vict. c. 66, s. 34, sub-s. (3); Walsh *v.* Lonsdale, 21 Ch. D. 9.

(*o*) Bankes *v.* Small, 36 Ch. D. 716.

the legal estate remains in the vendor till the conveyance is completely executed, the vendor is in equity considered as having become a *trustee* for the vendee from the time specified in the contract; and the vendee, on the other hand, to have become a trustee for the vendor from the same period, so far as the purchase money is concerned (*p*). The Court of Chancery was also latterly enabled to give damages either in addition to or in lieu of specific performance (*q*); and the Chancery Division may still do so.

3rdly. With reference to *injunctions*, it is to be observed, that, prior to the Judicature Acts, relief of this equitable nature was almost exclusively to be sought in the Court of Chancery; and in all those cases in which the Court of Chancery could alone have originally granted this relief, the action for an injunction should still be brought in the Chancery Division of the High Court of Justice (*r*); although, now, any division of the court may, in a proper case, grant this relief, it forming one of the provisions of the Judicature Act (36 & 37 Vict. c. 66), s. 25, that an injunction may be granted by an *interlocutory* order of the court in all cases in which it shall appear to the court to be "*just or convenient*" that such order should be made (*s*). And as to the nature of the application itself, it may be made in a variety of cases (*t*); and it is usually sought in order to restrain, either till the hearing of the action or permanently, acts in violation of the applicant's rights or alleged rights, *e. g.*, the infringement of a patent or copyright, or the commission of waste or nuisance; and in instances of an urgent nature (but only in such cases), it may (if the case be supported by a proper affidavit,) be

(*p*) Lysaght *v.* Edwards, 2 Ch. Div. 499.

(*q*) 21 & 22 Vict. c. 27 (Lord Cairns' Act); Anglo-Danubian Company *v.* Rogerson, Law Rep., 4 Eq. 3.

(*r*) Flower *v.* Local Board of Low Leyton, 5 Ch. D. 347.

(*s*) Day *v.* Brownrigg, 10 Ch. Div. 294; Beddow *v.* Beddow, 9 Ch. D. 89.

(*t*) Beddow *v.* Beddow, 9 Ch. D. 89.

obtained *ex parte*, that is to say, without any previous notice to the opposite party. The injunction is, moreover, usually *prohibitory;* but in exceptional cases it is *mandatory*, *i. e.*, indirectly securing the performance of some act or the restoration of the original *status quo* (*u*). An injunction also used sometimes to be sought to restrain a person from prosecuting his legal action, or from enforcing a judgment he had obtained therein; but, with regard to the Supreme Court, the Judicature Acts have now provided, that no cause or proceeding pending in the High Court of Justice or before the Court of Appeal shall be restrained either by prohibition or injunction; and that every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained if the Act had not passed, either unconditionally or on any terms and conditions, may be relied on by way of defence to the action; and these courts may also direct a stay of proceedings in any cause or matter pending before them (*x*). But an injunction may still issue to restrain the *institution* of legal proceedings in the High Court (*y*); or indeed in any court.

4thly. As to the *perpetuation of testimony*. The examination of witnesses never takes place in a legal action, except with reference to matters in respect of which some proceeding has been already commenced; but it is sometimes very material for the protection of existing rights, that the evidence relating to them should be taken and preserved, though they may not yet be the subject of any legal proceedings,—the position of the parties interested being such as not yet to afford any opportunity for litigation, while at the same time there may be reasons for expecting a future contest of the right, and that at a period when the witnesses, now competent to give material evidence upon it,

(*u*) Tulk *v.* Moxhay, 2 Phill. 774.

(*x*) 36 & 37 Vict. c. 66, s. 24, sub-s. (5); Ex parte Reynolds, 15 Q. B. D. 169; Cobbold *v.* Pryke, 4 Exch. Div. 315; Ex parte Ditton, 1 Ch. D. 557.

(*y*) Cercle Restaurant *v.* Lavery, 18 Ch. Div. 555.

may have been removed by death (*z*). In such cases, therefore, the Chancery Division lends its aid, by permitting any of the parties interested to institute proceedings against the rest, with a view to the mere perpetuation of the testimony, and without reference to any other present relief; and this is effected by taking down the examinations or depositions of the witnesses,—which, in the event of the right being tried at any future period when the attendance of the witnesses can no longer be procured, may be received in evidence between the same parties or those claiming under them. And with a view to extending the application of so convenient and important a remedy, it was enacted, by the 5 & 6 Vict. c. 69, that any person who would, under the circumstances alleged by him to exist, become entitled, upon the happening of any future event, to any honour, title, dignity, or office (or to any estate or interest in property real or personal), the right or claim to which cannot by him be brought to trial before the happening of such event,—should be entitled to take proceedings in equity, to perpetuate any testimony material for establishing such claim or right (*a*). Moreover, by the 21 & 22 Vict. c. 93, and 22 & 23 Vict. c. 61, s. 7, a jurisdiction of a somewhat similar, though more limited, kind was conferred on the Divorce Court (and is now vested in the analogous Division of the High Court), with reference to questions of legitimacy and nationality (*b*).

[These are some few of the matters wherein equitable jurisdiction is exercised,—which jurisdiction differs, we see, very considerably, from the notions entertained of it by strangers; and in fact, equity now fulfils what Lambard said of it in the reign of Queen Elizabeth (*c*), that "equity should " not be appealed unto but only in rare and extraordinary

(*z*) Earl Spencer *v.* Peek, Law Rep., 3 Eq. Ca. 415; Woollridge *v.* Norris, Law Rep., 6 Eq. Ca. 413.

(*a*) Ord. xxxvii. (1883), rr. 35—38; Marquis of Bute *v.* James, 33 Ch. Div. 157.

(*b*) Frederick *v.* Att.-Gen., L. R., 3 P. & M. 270; supra, vol. II. p. 247.

(*c*) Archeion, 80, 81.

[" matters; and that a good chancellor will not arrogate " authority in every complaint brought before him upon " whatsoever suggestion,—thereby overthrowing the autho- " rity of the courts of common law, and bringing upon " men such a confusion and uncertainty as hardly any man " should know how or how long to hold his own assured to " him." And since the time when Lambard wrote, a succession of great and eminent lawyers have by degrees erected the system of equitable relief into a regular science (*d*); which cannot be attained without study and experience, any more than the science of law:] but from which, when understood, it may be known what equitable remedy a suitor is entitled to expect, and by what proceeding,—as readily and with as much precision as if he had occasion to bring a legal action.

(*d*) Vide supra, pp. 363, 364.

CHAPTER X.

OF THE LIMITATION OF ACTIONS.

We have now considered the various injuries between subject and subject, of which the law takes notice, and the general nature of the remedies which the law has provided for their redress; and now this further point comes up for consideration, namely, is the appointed remedy still available, or has it been lost by lapse of time; for by certain statutes called the *Statutes of Limitation*, after a certain period, redress is barred by the mere effect of the lapse of time.

The Statutes of Limitation have for their object to preserve the peace of the kingdom; and to prevent those innumerable perjuries which might ensue, if a man were allowed to bring an action for an injury committed—or to enforce a right by entry or distress—at any distance of time; and upon these accounts our law therefore holds that *interest reipublicæ, ut sit finis litium;* just as, by the laws of Greece and Rome, actions were prohibited in cases where the injury was committed a certain period before the complaint was made (*a*). Nor are these the only reasons on which the bar by lapse of time is founded; for if the plaintiff were permitted to bring a claim forward at any period, however remote, there would be danger of its being delayed until the defendant had, by some casualty, been deprived of the documentary or other evidence by

(*a*) 3 Bl. Com. 308.

which it might once have been successfully encountered; and the delay might even be practised with the fraudulent design of exposing him to this disadvantage; besides which, it is to be considered, that a supine claimant is entitled to no favour or protection from the law,—the maxim being, that *vigilantibus, non dormientibus, jura subveniunt.*

The course of legislation upon the subject under consideration, has been such as will lead us to treat separately of such statutory limitations as have reference to land and the rights issuing thereout, and of such as have reference to things personal, and the rights arising out of these. The first of these two branches shall be now discussed:—

I. Of limitations as to entry or distress on land, and proceedings for the recovery of the realty, or of rights issuing thereout.—It was with reference to *real* actions, that the law of limitations was first established; and, originally, such actions were limited from some particular event, or fixed era. Thus, by the antient law in the time of Henry the second, the demandant, in a writ of right, could not claim upon any seisin earlier than the reign of Henry the first; nor, by the Statute of Merton, (20 Hen. III. c. 8,) earlier than the reign of Henry the second; nor by the Statute of Westminster the first, (3 Edw. I.) c. 39, earlier than the reign of Richard the first (*b*); and the same species of limitation, though from more recent dates, was from time to time appointed for many other kinds of real action. But these dates were allowed afterwards to continue so long unaltered, that in process of time they became, in effect, no limitation at all; which gave rise at length to the Statute of Limitations, 32 Hen. VIII. c. 2; which Act took a different course, and limited *real* actions, not from any fixed date or event, but according to a fixed interval of antecedent

(*b*) 3 Bl. Com. p. 196; Com. Dig. Temps. (G).

time (*c*); and afterwards, by 21 Jac. I. c. 16, s. 1, it was enacted, that no person should make *entry* into any lands or hereditaments, but within twenty years after his right should have first accrued (*d*).

And thus stood the doctrine of limitation in general, so far as relates to real property, from the dates of these statutes respectively till the reign of William the fourth; upon which branch of the law, however, as it then existed, we may make some few additional remarks. First, then, it may be observed, that there originally existed no provision that was applicable to *claims by the crown;* for the maxim formerly was, that *nullum tempus occurrit regi;* and the statute of Henry the eighth was not so framed as to bind the crown's rights. By the statute, indeed, of 21 Jac. I. c. 2, a time of limitation was established in the case of the sovereign, viz. sixty years precedent to 19th February, 1623 (*e*); but this of course became ultimately ineffectual by reason of the gradual efflux of time. It was, however, at length provided, by 9 Geo. III. c. 16, that in suits relating to land, the crown should be bound by the lapse of sixty years; by which statute,—as amended in certain points by 24 & 25 Vict. c. 62,—the law relating to this subject is still governed (*f*). Secondly, we may

(*c*) 3 Bl. Com. 189. This statute, 32 Hen. 8, c. 2 (which fixed the limit at *thirty*, if the demandant claimed on his own seisin, and at *fifty*, or in some cases *sixty*, years, when he claimed on the seisin of his ancestor), extended to *rents, suits, and services*, as well as to other hereditaments; but only to those which were incidents of tenure, and not to those created by deed, or reserved on a particular estate, or on copyhold grants; and it did not extend to services of a casual kind, such as by possibility might not become due within the period of limitation,—such as fealty. (Com. Dig. Temps. (G), 9; Hollins *v.* Verney, 11 Q. B. D. 715; 13 Q. B. D. 304.)

(*d*) Christ. Bl. Com. vol. iii. p. 204, n. (2); p. 206.

(*e*) 3 Inst. 189.

(*f*) See also 21 Jac. 1, c. 14, making some regulations as to *informations of intrusion*, where the crown has been out of possession for twenty years; and 7 & 8 Vict. c. 105; 23 & 24 Vict. c. 53; 24 & 25 Vict. c. 62, s. 2, as to suits arising *within the duchy of Cornwall.*

remark, that even up to the reign of William the fourth there existed no limitation with regard to the time within which actions concerning *advowsons* were to be brought, at least none later than the times of Richard the first and Henry the third; for, by the statute 1 Mar. sess. 2, c. 5, the 32 Hen. VIII. c. 2 was declared not to extend to any writ of right of advowson, *quare impedit*, or assize of darreign presentment, or *jus patronatûs* (*g*). And the reason for this seems to have been, because it may very easily happen, that the title to an advowson may not come in question, nor the right have an opportunity to be tried, within the period of sixty years,—which was the longest time of limitation assigned by the statute of Hen. VIII. Indeed, instances are not wanting wherein two successive incumbents have continued for upwards of a hundred years; and if, therefore, the last of these incumbents had been the clerk of an usurper, or if he had been presented by lapse, it would have been necessary and unavoidable for the patron, in case of a dispute, to have recurred back above a century, in either of these two cases, in order to have shown a clear title and seisin by presentation and admission of the prior incumbent (*h*).

The state of the law of limitation above described having attracted attention, various improvements were suggested on the subject, founded on the opinion which became prevalent, that *twenty* years was an allowance of time reasonably sufficient in every case for the recovery of corporeal hereditaments,—provided the claimant laboured under no disability to assert his pretensions; and these recommendations were afterwards embodied in the statute 3 & 4 Will. IV. c. 27 (*i*). But it has since been considered, that even that space of time is more than enough;

(*g*) 3 Bl. Com. 250; 7 Ann. c. 18.

(*h*) 3 Bl. Com. 251.

(*i*) Grant *v.* Ellis, 9 Mee. & W. 113; Owen *v.* De Beauvoir, 16 Mee. & W. 547; 5 Exch. 166; Forsyth *v.* Bristowe, 9 Exch. 716; Manning *v.* Phelps, 10 Exch. 59; Humfrey *v.* Gery, 7 C. B. 567; Borrows *v.* Ellison, Law Rep., 6 Exch. 128.

and that *twelve* years is the proper period of limitation; and this latter limit, has been established by the 37 & 38 Vict. c. 57 (The Real Property Limitation Act, 1874), which, together with the previous statutes 3 & 4 Will. IV. c. 27, and 7 Will. IV. & 1 Vict. c. 28, now governs the law of limitation in all proceedings, (other than those to which the crown is a party,) for recovery of things real; and these three Acts comprise a body of enactments, the principal of which are as follows:—

1. That no person (*k*) shall, after 1st January, 1879 (*l*), make entry or distress upon, or bring an action to recover, any land (*m*) or rent (*n*),—unless within *twelve* years next after the time at which the right to make such entry or distress, or to bring such action, shall have *first accrued* (*o*), to the person making or bringing the same. This rule is subject, however, to qualification in the case of persons under disability,—it being provided, that if, at the time at which the right of any person shall *first accrue*, such person shall be under the disability of infancy, coverture, idiocy, lunacy, or unsoundness of mind (*p*),—then he, or the person claiming through him, may, though twelve years have expired, enter, distrain, or sue within six years next

(*k*) The term "person," extends to any body politic, corporate, or collegiate, and to any *class* of creditors or other persons as well as to an individual. (3 & 4 Will. 4, c. 27, s. 1.)

(*l*) The 3 & 4 Will. 4, c. 27, came into force the 1st January, 1833; and the 37 & 38 Vict. c. 57, came into force on the 1st January, 1879.

(*m*) The term "land" extends to all corporeal hereditaments, and also to tithes, (other than tithes belonging to a spiritual or eleemosynary corporation sole,) and whether the lands are freehold or copyhold. (3 & 4 Will. 4, c. 27, s. 1.)

(*n*) "Rent" extends to all heriots, services and suits, for which distress may be made; and to all annuities and periodical sums of money charged on land, other than moduses or compositions belonging to a spiritual or eleemosynary corporation sole. (See Irish Land Commission *v.* Grant, 10 App. Ca. 14.)

(*o*) 3 & 4 Will. 4, c. 27, s. 2; and 37 & 38 Vict. c. 57, s. 1.

(*p*) Prior to 37 & 38 Vict. c. 57, s. 4, "absence beyond seas" used to be, but no longer is, a disability; and coverture cannot, since the Married Women's Property Act, 1882, be regarded as a disability, as regards any title accruing on or after the 1st January, 1883.

after the person to whom the right accrued shall have died or ceased to be under disability, whichever event shall first happen (*q*); but no such right of entry, distress, or action, shall be exercised, except within *thirty* years next after the right accrues,—even though the disability may have attached during the whole of the thirty years, or although the term of six years above mentioned shall not have yet expired (*r*). And it being necessary to define with exactness the time at which the right of entry shall have *first* accrued, the Act 3 & 4 Will. IV. c. 27, ss. 3—9, and the Act 37 & 38 Vict. c. 57, s. 2, have, by their combined effect, provided, that the right of entry shall be deemed to have first accrued as follows:—In the case of a person in possession, on his dispossession; in the case of an heir or devisee in possession, on the death of his testator or ancestor who has died in possession; in the case of a grantee by deed in possession, on the execution of the deed; in the case of remaindermen and reversioners, and persons entitled to other future estates, on their remainders, reversions, or other future estates falling into possession; in the case of remaindermen and others becoming entitled to possession by reason of any forfeiture or breach of condition, on the occurring of such forfeiture, or on the breach of such condition, or (but in the case of remaindermen and reversioners only) at the time when their remainders or reversions would have fallen into possession if there had been no such forfeiture or breach of condition (*s*). But as regards all remainders, reversions, and future estates expectant on a particular estate (the owner of which particular estate shall have been, and until the determination thereof continued to be, dispossessed), the right of entry is to be deemed to have been barred at the expiration of one or other (whichever shall be the longer) of the two following periods,—that is to say, twelve years from the dispossession

(*q*) Sect. 3; Borrows *v.* Ellison, Law Rep., 6 Exch. 128.

(*r*) Sect. 5.

(*s*) Sturgis *v.* Darell, 4 H. & N. 622.

of the particular estate, or six years from its determination (*t*); at which time also (*i.e.*, on the expiration thereof) will be barred all (if any) titles created subsequently to such dispossession of the particular estate out of or in the remainders or reversions thereon (*u*).

2. That when the right of entry of a tenant in tail is barred, all estates which he had power to bar shall be also barred; and that a tenant in tail dying before his right of entry is barred, the right of entry of all estates which he had power to bar, shall be barred on the expiration of the period which would have barred the tenant in tail himself if he had so long lived; and that a person in possession under a base fee created by any tenant in tail, shall, after twelve years from the time when such tenant in tail might (without the consent of any other person) have created a fee simple absolute, acquire the fee simple absolute, unless in the meantime the person entitled to the remainder or other future estate has recovered the possession (*v*).

3. That no person claiming any land or rent in *equity*, shall bring proceedings to recover the same, but within the same period during which he might have entered, distrained, or brought an action for recovery thereof, if his estate had been legal instead of equitable (*x*). This is subject however to the following provisions:—*Firstly*, That when land or rent is vested in a trustee upon some express trust, the right of the *cestui que trust*, or any one claiming through him, to sue the trustee, or any one

(*t*) Pedder *v.* Hunt, 18 Q. B. D. 565.

(*u*) In the case of reversions on tenancies at will, the right of entry first accrues on the determination of the will, or (at the latest) on the expiration of one year from the commencement of the tenancy; and in the case of reversions on tenancies from year to year (not being by lease in writing), at the end of the first year, or (at the latest) on the last payment of rent; and in the case of reversions on leases in writing (reserving 20*s.* or more of annual rent), on such rent being received adversely by a person wrongfully claiming such reversion.

(*v*) 3 & 4 Will. 4, c. 27, ss. 21—23; 37 & 38 Vict. c. 57, s. 6; Austen *v.* Llewellyn, 9 Exch. 276; Dawkins *v.* Lord Penrhyn, 6 Ch. D. 318.

(*x*) 3 & 4 Will. 4, c. 27, s. 24.

claiming through him, in order to recover the same,—shall be deemed to have first accrued when such land or rent was conveyed to a purchaser for a valuable consideration; and shall then be deemed to have accrued only as against such purchaser, and any person claiming through him (*y*); for, of course, the remedy against the trustee himself is always open, and time does not run to protect the trustee himself,—at least, not as a general rule (*z*). *Secondly*, That in every case of a concealed fraud, the right to sue in equity for the recovery of the land or rent shall be deemed to have first accrued when such fraud was, or with reasonable diligence might have been, first known or discovered by the person injured (*a*): but not so as to enable any owner of lands or rents to sue in equity for their recovery or for setting aside any conveyance of them, on account of fraud, against any *bonâ fide* purchaser for valuable consideration,—provided such purchaser did not assist in the commission of the fraud, nor at the time of his purchase knew, or had reason to believe, that any such fraud had been committed (*b*). *Thirdly*, That nothing therein contained shall interfere with any rule of equity in refusing relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may *not* be barred by virtue of the statute (*c*). *Fourthly*, That when a mortgagee shall have obtained the possession or receipt of the rents or profits of any land comprised in his security, the mortgagor, or any person claiming through him, shall not take proceedings to redeem the mortgage, except within twelve years next after the time at which the mortgagee obtained such possession or receipt,—unless in the meantime the mortgagee

(*y*) Sect. 25.

(*z*) 36 & 37 Vict. c. 66, s. 25; and see 37 & 38 Vict. c. 57, s. 10 (as to *charges* on land secured by an express trust); and 51 & 52 Vict. c. 59, s. 8 (as to the protection of *innocent* trustees).

(*a*) Gibbs *v.* Guild, 8 Q. B. D. 296; 9 Q. B. D. 59.

(*b*) 3 & 4 Will. 4, c. 27, s. 26; Chetham *v.* Hoare, Law Rep., 9 Eq. Ca. 571; Vane *v.* Vane, L. R., 8 Ch. App. 383.

(*c*) Sect. 27; De Bussche *v.* Alt, 8 Ch. Div. 286; Blake *v.* Gale, 31 Ch. Div. 196.

shall have given an acknowledgment of title, or of the right of redemption, to the mortgagor, or to some person claiming his estate, or to the agent of such mortgagor or person; and such acknowledgment must be in writing signed by the mortgagee, or the person claiming through him; nor can such proceedings for redemption be brought, except within twelve years next after such acknowledgment, or the last of such acknowledgments, if more than one was given (*d*); and, as between mortgagors and mortgagees, no extension of time is allowed for disabilities (*e*).

4. That no action or other proceeding shall be brought to recover any money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy, except within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same,—unless, indeed, part of the principal money shall have been paid or an acknowledgment in writing given, and then only within twelve years after such payment or acknowledgment (*f*); and as regards such charges on land, although the same should be secured by an express trust, the time is not to be enlarged (*g*).

5. That no *arrears* of rent, or of interest (in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy), or any damages in respect of any such arrears of rent or interest, shall be recoverable, but within *six* years after the same shall have become due or been acknowledged in writing to the person entitled thereto or his agent, signed by the party chargeable or his agent,—subject to this proviso, that where

(*d*) 7 Will. 4 & 1 Vict. c. 28; 37 & 38 Vict. c. 57, s. 7.

(*e*) Kinsman *v.* Rouse, 17 Ch. D. 104; Forster *v.* Patterson, ib. 132; Adnam *v.* Earl of Sandwich, 2 Q. B. D. 485; Heath *v.* Pugh, 6 Q. B. D. 34; Sands *to* Thompson, 22 Ch. D. 614; Newbould *v.* Smith, 29 Ch. Div. 882.

(*f*) 37 & 38 Vict. c. 57, s. 8; 23 & 24 Vict. c. 38, s. 13.

(*g*) 37 & 38 Vict. c. 57, s. 10.

a prior mortgagee or incumbrancer has been in possession, within one year next before action, the second mortgagee may in his action recover the arrears of his interest for the whole period (although exceeding six years) that the prior mortgagee has been in possession (*h*).

6. That no land or rent shall be recoverable by any spiritual or eleemosynary corporation sole, after the determination of such period as thereinafter mentioned next after the time at which the right of such corporation sole, or his predecessor, to recover shall have first accrued;—viz., the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, together with six years after a third person shall have been appointed thereto, if the times of such two incumbencies and six years (taken together) shall amount to the full period of *sixty* years; and if not, then during such further number of years as will make up the sixty years (*i*).

7. That no person shall bring a *quare impedit*, or other proceeding to enforce a right to present to or bestow any ecclesiastical benefice, as the patron thereof, after the expiration of such period as thereinafter mentioned,—viz., the period during which three clerks in succession shall have held the same, all having obtained possession thereof adversely to the right of such person, or of some one through whom he claims,—provided such incumbencies taken together shall amount to the full period of sixty years; and if not, then after the expiration of such further time as will make up the sixty years (*k*).

(*h*) 3 & 4 Will. 4, c. 27, s. 42; Edmonds *v.* Waugh, Law Rep., 1 Eq. Ca. 418; Ex parte Clarke, ib. 3 Eq. Ca. 313; Coope *v.* Cresswell, ib. 2 Ch. App. p. 112; Marshfield *v.* Hutchings, 34 Ch. Div. 721.

(*i*) 3 & 4 Will. 4, c. 27, s. 29; and regarding the time within which the Ecclesiastical Commissioners for England may, as successors of the estates of ecclesiastical corporations, sue for the recovery of land, see Ecclesiastical Commissioners *v.* Rowe, 5 App. Ca. 736; and the statute 3 & 4 Vict. c. 113, therein cited.

(*k*) Sect. 30.

8. That no person shall bring any such proceeding as mentioned in the last paragraph, after the expiration of *one hundred* years from the time at which a clerk shall have obtained possession of such benefice adversely to the right of such person,—or of one through whom he claims, or who is entitled to some preceding estate or interest, or undivided share, or alternate right of presentation or gift, held or derived under the same title,—unless a clerk shall subsequently have obtained possession of such benefice, on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share or right, held or derived under the same title (*l*).

II. Of limitations as to actions not brought for recovery of things real.—As regards these limitations, we must observe :—

1. That a period of limitation, with respect to most personal actions, was fixed by 21 Jac. I. c. 16, s. 3 (*m*) ; which provided, in substance, that actions of trespass in general ; all actions of detinue, trover (*n*), and replevin ; all actions of account (other than between merchants) (*o*) ; all actions upon the case, except for verbal slander ; and all actions of debt on simple contract, or for arrears of rent not due upon specialty (*p*),—shall be limited to *six* years after the cause of action accrued : that actions of trespass for the particular injuries of assault, menace, battery, wounding,

(*l*) Sect. 33. The periods thus limited as above, for enforcing a right to present to or bestow an ecclesiastical benefice, extend to the case where a bishop claims as *patron ;* but the Act does not affect the right of any bishop to collate by reason of *lapse*. (See 6 & 7 Vict. c. 54, s. 3.)

(*m*) Collinge *v.* Heywood, 9 Ad. & Ell. 633 ; Bonomi *v.* Backhouse, 9 H. of L. Cases, 503 ; Mitchell *v.* Darley Main Colliery Company, 14 Q. B. D. 125.

(*n*) Wilkinson *v.* Verity, Law Rep., 6 C. P. 206 ; Spackman *v.* Foster, 11 Q. B. D. 99.

(*o*) Cottam *v.* Partridge, 4 Man. & G. 271 ; but see now 19 & 20 Vict. c. 97, s. 9.

(*p*) 21 Jac. 1, c. 16, s. 3.

and imprisonment, shall be limited to *four* years; and that actions on the case for verbal slander, shall be limited to *two* years. But to these limitations, there are exceptions, in favour of persons labouring under *disability* (*q*); for if the person *entitled to sue* should, when the cause of action accrued, be an infant, a feme covert, or *non compos*,—then he (or she) might sue within the same period after the removal of the disability, as is allowed to persons having no such impediment (*r*); and excepting, *semble*, as regards married women (who are not now under disability in the general case), the law still remains the same. But whereas the statute of 21 Jac. I. c. 16, s. 7, also made exception in other cases, viz., that of *imprisonment* of the party entitled to sue, and that of his being *beyond the seas*, these are no longer disabilities; for, by 19 & 20 Vict. c. 97, s. 10, no person or persons shall be entitled to sue at any time beyond the period fixed by 21 Jac. I. c. 16, s. 3, by reason only of such person, or one or more of such persons, being beyond the seas, or imprisoned, at the time when the cause of action or suit accrued (*s*). And it was provided, by 4 & 5 Ann. c. 3, s. 12, that if any person *liable to be sued* should, when the cause accrued, be beyond the seas (*t*),—a similar extension of the time for bringing the action should in that case also be permitted; but this provision must now be read subject to the 19 & 20 Vict. c. 97, s. 11, which has enacted, that where the cause of action lies against two or more joint debtors, the person entitled to sue shall not be entitled to any extension of time, against such one or more of them as were not beyond seas when the cause of action

(*q*) Sect. 7.

(*r*) Le Veux *v.* Berkeley, 5 Q. B. 836; Townsend *v.* Deacon, 3 Exch. 706.

(*s*) Cornil *v.* Hudson, 8 Ell. & Bl. 429; Pardo *v.* Bingham, Law Rep., 4 Ch. App. 735.

(*t*) By 19 & 20 Vict. c. 97, s. 12, no part of the United Kingdom, Man, Guernsey, Jersey, Alderney, and Sark, nor the adjacent islands, being part of the dominions of her Majesty, shall be deemed "beyond seas" within the meaning of 4 & 5 Ann. c. 3.

accrued; and on the other hand, that he shall not be barred from suing the joint debtor or debtors, after his or their return, by reason only that judgment has been already recovered against one or more of the others (*u*).

The operation of the statute of James, with respect to actions upon *simple contract*, was at one time considerably narrowed, by the doctrine which prevailed, that not only a payment on account of principal or interest, but any mere verbal acknowledgment, made before action brought, to the effect that the debt was due,—would suffice to take the case *out of the statute* (according to the common phrase), by raising an implied promise to pay the debt; upon which promise, (as upon a new cause of action,) the same time for instituting proceedings would again be allowed as upon the original contract (*x*); but the law on this subject has been since materially altered; for by Lord Tenterden's Act (9 Geo. IV. c. 14, s. 1), it was enacted, that in actions grounded upon any simple contract, no acknowledgment, or promise, shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the 21 Jac. I. c. 16,—unless such acknowledgment or promise is contained in some *writing*, containing or amounting to a promise to pay (*y*), signed by the party to be charged, or by his duly authorized agent (*z*); and that where there are two or more joint contractors, no such joint contractor shall be chargeable, in respect only of the

(*u*) Towns *v.* Mead, 16 C. B. 123.

(*x*) Bateman *v.* Pindar, 3 Q. B. 574; Maber *v.* Maber, Law Rep., 2 Exch. 153.

(*y*) Spong *v.* Wright, 9 Mee. & W. 629; Hart *v.* Prendergast, 14 Mee. & W. 741; Willins *v.* Smith, 4 Ell. & Bl. 180; Cornforth *v.* Smethard, 5 H. & N. 13; Tanner *v.* Smart, 6 B. & C. 603; Lee *v.* Wilmot, Law Rep., 1 Exch. 364; Chasemore *v.* Turner, ib. 10 Q. B. 500; Quincey *v.* Sharpe, 1 Ex. D. 72; Skeet *v.* Lindsay, 2 Ex. D. 314; Meyerhoff *v.* Froehlich, 3 C. P. D. 333; Banner *v.* Berridge, 18 Ch. D. 254; Sanders *v.* Sanders, 19 Ch. D. 373; Curwen *v.* Milburn, 42 Ch. D. 424; and disting. Green *v.* Humphreys, 26 Ch. D. 474.

(*z*) 19 & 20 Vict. c. 97, s. 13.

written acknowledgment of the other; and by 19 & 20 Vict. c. 97, s. 14 (*a*) it has been since provided, (with reference to the statute of James as bearing upon the effect of a *payment* on account of principal or interest in respect of a joint contract or debt,) that no co-contractors, or co-debtors, shall lose the benefit of the limitation, by reason only of any payment of principal or interest by any of the others (*b*).

2. The statute of 21 Jac. I. c. 16, made no provision for actions on bonds, indentures, or other instruments *under seal;* and consequently, parties having claims on such instruments were at liberty to sue upon them at any period of time, however distant; and though, to prevent the injustice which such a state of the law would otherwise have occasioned, it became the practice, on the trial of such actions, for the judge to recommend the jury, in cases where no payment on account of principal or interest had been made or demanded within twenty years, to presume that the bond or other specialty had been satisfied,—this method of proceeding was not found to adapt itself so conveniently to the purposes of justice, as a law of direct limitation; and such limitation has been accordingly now provided, with respect to claims on instruments under seal,—as well as some other cases, not embraced by the statute of James (*c*). For it has been enacted, by the 3 & 4 Will. IV. c. 42, s. 3, that all actions of debt for rent upon any indenture of demise, or of covenant, or of debt on any bond or other specialty, and all proceedings on recognizances,—shall be brought within *twenty years* after the cause of action or proceeding accrued; and that all actions of debt

(*a*) Jackson *v.* Woolley, 8 Ell. & Bl. 778; Cockrill *v.* Sparkes, 1 Hurl. & C. 699.

(*b*) Cleave *v.* Jones, 20 L. J. (Exch.) 238; Burn *v.* Boulton, 2 C. B. 476; Wainman *v.* Kynman, 1 Exch. 118; Bodger *v.* Arch, 10 Exch. 333; Walker *v.* Butler, 25 L. J. (Q. B.) 377; Turney *v.* Dodwell, 3 Ell. & Bl. 136; Maber *v.* Maber, Law Rep., 2 Exch. 153.

(*c*) Coope *v.* Cresswell, Law Rep., 2 Ch. App. 116.

upon an award, (where the submission is not under seal,) or for a copyhold fine, or for an escape, or for money levied upon any writ of *fieri facias*,—shall be brought within *six* years (*d*). This enactment is, however, subject to an exception in the case of any person who, when entitled to sue, is under disability—as an infant, or person *non compos*, or (formerly) a feme covert (*e*); and also to a proviso, that if any acknowledgment in writing be signed by the party liable or his agent, or any payment or satisfaction be made on account of any arrears of principal or interest,—the person entitled to the action may bring the same within twenty years after such acknowledgment payment or satisfaction (*f*); but, by 19 & 20 Vict. c. 97, s. 14, where there are several co-contractors or co-debtors, none of them loses the benefit of the limitation given by the 3 & 4 Will. IV. c. 42, s. 3, by reason only of any payment on account of principal or interest by any of the others.

3. By the statute 31 Eliz. c. 5, all suits and indictments upon any *penal statutes*, where the forfeiture is to the crown alone, must be prosecuted within *two years* from the commission of the offence (*g*); where the forfeiture is to a

(*d*) See also 4 & 5 Ann. c. 3, s. 17, with respect to the recovery of *seamen's wages;* and 55 Geo. 3, c. 127, s. 5, with respect to the recovery of the value *of tithes*.

(*e*) In the cases in which a period of limitation is fixed by 3 & 4 Will. 4, c. 42, s. 3, "absence beyond seas" of the party entitled to sue, was also (by sect. 4) made a disability; but its character in this respect has now been abolished by 19 & 20 Vict. c. 97, s. 10.

(*f*) 3 & 4 Will. 4, c. 42, s. 5; Forsyth *v.* Bristow, 8 Exch. 716. The twenty years has (by construction of the courts) been reduced to twelve years, in the case of covenants in mortgage deeds (Sutton *v.* Sutton, 22 Ch. Div. 511); and in the case of bonds collateral to the mortgage (Fearnside *v.* Flint, 22 Ch. Div. 579).

(*g*) This statute extended also to all *informations* upon any penal statutes; but so much of it as "relates to the time limited for "exhibiting an information for a "forfeiture upon any penal sta-"tute" was repealed by 11 & 12 Vict. c. 43, s. 36; which Act, however, goes on to provide (sect. 11), that all informations for offences punishable on summary conviction shall be laid within *six calendar months* from the time when the matter arose, unless the time for the information has been, as it

common informer alone, within *one* year (*h*); and where to the crown and a common informer jointly, then by the common informer within one year, and by the crown within two years after that year is expired; but this statute did not extend to penal actions at the suit of the party grieved; and therefore, by 3 & 4 Will. IV. c. 42, s. 3, it is required, that these actions also shall be brought within *two* years after the offence shall have been committed,—unless the particular statute which creates the forfeiture shall have expressly enacted otherwise.

4. By 5 & 6 Vict. c. 97, s. 5, it was enacted, that the period within which any action might be brought for any thing done under the authority, or in pursuance, of any *local or personal Act of Parliament*, should be *two years;* or, in case of continuing damage, then *one* year after such damage had ceased; and, by 11 & 12 Vict. c. 44, s. 8, it was provided, that no action should be brought against any *justice of the peace* for anything done in the execution of his office, unless commenced within *six calendar months* after the act committed. And there were similar provisions contained in many different Acts, with respect to *constables* and other public officers acting in purported execution of their duties, the period of limitation varying in the different cases (*i*); but with reference to actions (including prosecutions) against public officers generally, it is now provided, by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), for any alleged default in the execution of their duties by statute or otherwise, or for any act done in the execution or purported execution of such duties, the proceeding shall be taken within six months,—

usually is, otherwise specially limited (Re Edmondson, 17 Q. B. 67).

(*h*) Chance *v.* Adams, 1 Ld. Raym. 78; Dyer *v.* Best, Law Rep., 1 Exch. 152.

(*i*) 24 Geo. 2, c. 44, s. 8; 3 Geo. 4, c. 126, s. 147; 7 & 8 Geo. 4, c. 31, ss. 3, 12; 5 & 6 Will. 4, c. 50, s. 109; c. 76, s. 133; 8 & 9 Vict. c. 118, s. 165; 9 & 10 Vict. c. 95, s. 138; 38 & 39 Vict. c. 55, s. 264; 51 & 52 Vict. c. 43, s. 53.

notice prior to action no longer being required, but the proceeding not to be commenced (except at the risk of the plaintiff or prosecutor having to pay costs) without allowing time for the defendant to make tender of amends; and the plaintiff or prosecutor, if unsuccessful, pays the defendant's costs as between solicitor and client.

And thus much upon the law of limitation—both as regards entry or distress or action for recovery of the realty, and as regards actions brought with reference to the personalty; between which two classes of proceedings, the following further distinction is observable, namely, that as regards the former, the statute 3 & 4 Will. IV. c. 27, has, by its express provision, the effect of extinguishing the *right*, as well as of barring the *remedy* (*k*); but as regards the latter, the limitation bars the remedy only,—so that though I can bring no action to recover a debt on contract, after the expiration of the limited period, there is nothing to prevent my obtaining payment of the debt after that period in any other manner,—as, through the medium of any lien that I may hold on the property of the debtor (*l*); or if I am an executor, then by virtue of my right of retainer (*m*); but apparently I may not, at least in general, set off a debt the remedy for which is statute-barred (*n*).

We may also remark (in conclusion), with respect to actions the limitation of which is fixed either by 21 Jac. I. c. 16 or by 3 & 4 Will. IV. c. 42,—that, though periods are limited within which the action shall in different cases be commenced, yet in favour of vigilant plaintiffs the law has provided a method of constantly keeping the right of action alive, notwithstanding any lapse of time, (or, as it is commonly expressed, of *saving* the Statute of Limitation); and this is, by commencing an action and getting the writ of

(*k*) 3 & 4 Will. 4, c. 27, s. 34; Dawkins *v.* Lord Penrhyn, 6 Ch. D. 318; Johnson *v.* Mounsey, 11 Ch. D. 284.

(*l*) Higgins *v.* Scott, 2 B. & Ad. 413.

(*m*) Vide sup. p. 292.

(*n*) Walker *v.* Clements, 15 Q. B. 1046.

summons therein from time to time renewed—that is, impressed with a seal bearing the date of such renewal; for, by the 15 & 16 Vict. c. 76, s. 11, it was provided, that a writ so periodically renewed, should suffice to prevent the operation of the Statute of Limitation, though nothing further was done in the meantime in the action; and, under the Judicature Acts, there is a rule of the Supreme Court to the same effect; but, of course, every effort must be made to serve the defendant with the writ; for the writ can only be renewed, under an order of the court giving the plaintiff leave to do so; and such order will not be made, unless on proof that reasonable efforts have been made to serve the defendant (*o*).

(*o*) Ord. viii. (1883), r. 1; Nazer *v.* Wade, 1 B. & Smith, 728; In re Manchester Economic Building Society, 24 Ch. Div. 488; Doyle *v.* Kauffman, 3 Q. B. D. 7, 340.

CHAPTER XI.

OF THE PROCEEDINGS IN AN ACTION.

We have now completed our exposition of the different species of civil injuries, and of the remedy therefor by action; and we have now to consider the *manner* in which that remedy is pursued and applied in the High Court of Justice; in other words, we have now to consider the proceedings in an action. But as some of these could, according to the antient practice of the courts, be transacted only during particular periods called *Terms*, and as the arrangement of the legal year into terms is not only in itself interesting as illustrative of legal history, but is also, for some purposes, still of some practical importance (*a*),—we will advert shortly to this incidental matter, before we enter on the main business of the chapter.

[The Terms are supposed by Selden to have been instituted by William the Conqueror (*b*); but Sir H. Spelman hath clearly and learnedly shown, that they were gradually formed from the canonical constitutions of the Church,—being indeed no other than those leisure seasons of the year which were not occupied by the great festivals or fasts, or which were not liable to the general avocations of rural business. Throughout all Christendom, in very early times, the whole year was one continual term for hearing and deciding causes; for the Christian magistrates, to dis-

(*a*) College of Christ *v.* Martin, 3 Q. B. D. 16; 36 & 37 Vict. c. 66, s. 26.
(*b*) Jan. Ang. l. 2, s. 9.

[tinguish themselves from the heathens, who were extremely superstitious in the observation of the *dies fasti et nefasti*, went into a contrary extreme, and administered justice upon all days alike,—till at length the Church interposed, and exempted certain holy seasons from the tumults of litigation; and particularly, the time of Advent and Christmas, which gave rise to the winter vacation; the time of Lent and Easter, which created that in the spring; the time of Pentecost, which produced the third; and the long vacation between Midsummer and Michaelmas, which was allowed for the hay time and harvest. All Sundays, also, and some particular festivals, as the day of the Purification, Ascension day, and some others, were included in the same prohibition,—which was established by a canon of the Church, A.D. 517, and was fortified by an imperial constitution of the younger Theodosius, comprised in the Theodosian code (*c*).

Afterwards, when our own legal constitution came to be settled, the commencement and duration of Terms were appointed with an eye to those same canonical prohibitions; and it was ordered, by the laws of King Edward the Confessor (*d*), that from Advent to the octave of the Epiphany, from Septuagesima to the octave of Easter, from the Ascension to the octave of Pentecost, and from three in the afternoon of all Saturdays, till Monday morning, "the peace of God and of holy Church shall be kept "throughout all the kingdom." And so extravagant was the regard that was afterwards paid to these holy times, that, though the author of the Mirrour (*e*) mentions only one vacation of any considerable length,—containing the months of August and September,—yet Britton is express (*f*), that, in the reign of King Edward the first, no secular pleas could be held, nor any man sworn on the Evangelists, in the times of Advent, Lent, Pentecost,

(*c*) Spelman, Of the Terms.
(*d*) C. 3, De Temporibus et Diebus Pacis.
(*e*) Cap. 3, s. 8.
(*f*) Cap. 53.

[harvest, and vintage; or in the days of the great litanies; or during any solemn festivals. But he adds, that the bishops did nevertheless grant dispensations,—of which many are preserved in Rymer's *Fœdera* (*g*),—that assizes and juries might be taken in some of these holy seasons; and soon afterwards a general dispensation was established, by the Statute of Westminster the first, (3 Edw. I.,) c. 51, which declares, that "by the assent of all the prelates, *assize of* "*novel disseisin*, *mortancestor*, and *darreign presentment*, "shall be taken in Advent, Septuagesima, and Lent,—and "that, at the special request of the king to the bishops;" and the portions of time, not included within these prohibited seasons, fell naturally into a fourfold division, and, from some festival day that immediately preceded their commencement, were denominated the Terms of St. Hilary, of Easter, of the Holy Trinity, and of St. Michael,—which Terms were afterwards regulated by successive Acts of Parliament (*h*)], and, ultimately, by that of 11 Geo. IV. & 1 Will. IV. c. 70.

Immediately prior to the date of the last-mentioned statute, Easter and Trinity Terms depended on the *moveable* feasts of Easter and Trinity; but by its provisions, Hilary Term was fixed to begin on the 11th and end on the 31st January; Easter Term, to begin on the 15th April, and end on the 8th May; Trinity Term, to begin on the 22nd May, and end on the 12th June; and Michaelmas Term, to begin on the 2nd November, and end on the 25th; and it was further enacted, that if the whole (or any number) of the days intervening between the Thursday before and the Wednesday next after Easter-day, should fall within Easter Term, such Term should be prolonged, for such number of days of business as should be equal to the number of the intervening days before mentioned, exclusive of Easter-day,—the commencement of the en-

(*g*) Tem. Hen. 3, *passim*.

(*h*) Prior to these Acts, Trinity Term, in particular, had been regulated by 32 Hen. 8, c. 21; and Michaelmas Term, by 16 Car. 1, c. 6, and 24 Geo. 2, c. 48.

suing Trinity Term to be in such case postponed, and its continuance to be prolonged for an equal number of days of business (*i*); and that, in case the day of the month on which any Term was to *end* should fall on a Sunday, the Monday next after should be deemed to be the last day of the Term (*k*). The case of the day of the month fixed for the commencement of Term falling on a Sunday, was not expressly provided for; but it was decided, by the courts, that, for the purpose of computation, the Sunday should in that case be considered, for some purposes at least, as the first day of the Term (*l*).

With respect to the kind of proceedings which used to be conducted exclusively in Term, we may remark, that in general all sittings in *banc* for the determination of matters of law, were of that character; on the other hand, the sittings of the courts of *assize* and *nisi prius* for the determination of matters of fact, were for the most part held in vacation,—that is, during the intervals between the Terms: while all proceedings in an action *out of court*, that is to say, such as did not require the actual presence of the judges themselves, but could be transacted between the parties and their solicitors, were in modern times transacted during the vacations (with the exception of a period of recess, known as the "long vacation," viz. from 10th August to 24th October), as well as in Term time (*m*). But

(*i*) 11 Geo. 4 & 1 Will. 4, c. 70, s. 6; Wright *v.* Lewis, 9 Dowl. 183; Donnes *v.* Bostock, ib. 241.

(*k*) 1 Will. 4, c. 3, s. 3.

(*l*) Doe *v.* Roe, 1 Dowl. 63.

(*m*) The practice on this subject was antiently very different. All writs must have been made returnable in term; every pleading and every entry of judgment, even when in fact delivered or entered in vacation, must always have been intituled of some antecedent term; the plaintiff, though at liberty to *declare* in vacation, could not compel the defendant to plead until the subsequent term; and a party obtaining a verdict in vacation, on the trial of any issue, or on any inquisition of damages, had also to wait in every case until the term next following, before he could sign final judgment, or take out execution. (See the Second Report of the Common Law Commissioners appointed in 1828, p. 28.)

the inconvenience to suitors from the above restrictions, notwithstanding the numerous relaxations thereof, was strongly felt; and eventually the Judicature Acts provided, that the division of the legal year into Terms should be abolished, so far as relates to the administration of justice; and that there should no longer be Terms applicable to any sitting or business of the High Court of Justice, or of the Court of Appeal, or of any commissioners to whom any jurisdiction might be assigned; but that in all other cases in which, under the law then existing, the terms into which the legal year is divided were used as a measure for determining the time at or within which any act was required to be done, the same might continue to be referred to, for the same or the like purpose, until provision was otherwise made by lawful authority (*n*),—which has not yet been done; but the legal year is now disposed of as follows:—There are four sittings of the Supreme Court in every year (*o*), viz.: 1. The Michaelmas sittings, commencing 2nd November (but by Order in Council, commencing, in fact, the 24th October) and ending 21st December; 2. The Hilary sittings, commencing 11th January and ending Wednesday before Easter; 3. The Easter sittings, commencing on the Tuesday after Easter week and ending on the Friday before Whit Sunday; and 4. The Trinity sittings, commencing on the Tuesday after Whitsun week and ending 8th August (*p*), (but, in fact, by Order in Council, ending the 12th August). There are also the following four vacations:—1. The Long vacation, originally commencing 10th August and ending 24th October, but now, by Order in Council, commencing the 13th August and ending 23rd October; 2. The Christmas vacation, commencing 24th December and ending 6th January; 3. The Easter vacation, commencing Good

(*n*) 36 & 37 Vict. c. 66, s. 26; College of Christ *v.* Martin, 3 Q. B. D. 16.

(*o*) Ord. lxiii. (1883); Daubney *v.* Shuttleworth, 1 Ex. D. 53.

(*p*) Ord. lxiii. (1883) r. 1.

Friday and ending on Easter Tuesday; and 4. The Whitsun vacation, commencing on the Saturday before Whit Sunday and ending on the Tuesday after Whit Sunday (*q*); but during the vacations two of the Judges of the High Court (selected yearly as "vacation Judges") sit for the hearing of all such applications as may require to be immediately or promptly heard (*r*); and subject to the above arrangements, sittings for the trial by jury of causes and questions or issues of fact are held continuously throughout the year (*s*).

The proceedings in an action or suit are now to be considered. And prior to the 2nd November, 1875, these proceedings, when in the courts of law, were commenced by *writ of summons;* and when in the Court of Chancery, by *bill* or *information* or *petition:* when in the Court of Admiralty, by a *cause in rem* or *in personam:* when in the Court of Probate, by a *citation:* and when in the Court for Divorce and Matrimonial Causes, by a *petition*—each with a procedure of its own (*t*). It was, however, obvious, that most of these proceedings might conveniently be called by the same name, and to a certain extent be governed by the same rules of practice; and, accordingly, the Judicature Acts provided, that all actions which had theretofore been commenced by writ in the superior courts of common law (*u*), and all suits by bill or information in the Court of Chancery, or by a cause *in rem* or *in personam* in the Court of Admiralty, or by citation or otherwise in the Court of Probate, should be

(*q*) Ord. lxiii. (1883), r. 4.

(*r*) Ibid. r. 11; Re Wigan Junction Railway Company, Law Rep., 10 Ch. App. 541.

(*s*) 36 & 37 Vict. c. 66, s. 30.

(*t*) The terms "action" and "suit at law," were both commonly used in speaking of the remedy afforded by a court of law; and it has been provided, by the Judicature Acts, that in their construction, unless there is anything in the subject-matter or context repugnant thereto, the word "suit" shall include "action" (36 & 37 Vict. c. 66, s. 100); and that the word "cause" shall include any action, suit, or other original proceeding between a plaintiff and a defendant; and any criminal proceeding by the crown. (Ibid.)

(*u*) Ord. i. (1883), r. 1.

instituted in the High Court of Justice by a proceeding to be called "an action," and should be commenced by a writ of summons (*x*); and such is still substantially the case; but (under later rules) a large amount of legal business, more especially in the Chancery Division, may also be commenced by what is called an originating summons under Order LV.

Confining our remarks for the present to an action in the Queen's Bench Division of the High Court of Justice, and reserving the proceedings which take place (by action or otherwise) in the other Divisions, with regard to matters over which they have exclusive jurisdiction, to be separately considered hereafter,—The most convenient way of considering the course of a legal action will be to pursue the order and method wherein the proceedings themselves follow each other, the regular and orderly parts of such an action being these: I. The process; II. The pleadings; III. The trial and evidence; IV. The judgment; V. The proceedings by way of appeal; and VI. The execution (*y*).

I. The *Process*:—The first object in an action is to procure the defendant's *appearance* in court. The term *appearance*, (whether applied to plaintiff or defendant,) had reference originally to the practice of the litigants personally, or by their respective attorneys, actually confronting each other in open court; but this appearance has, for centuries past, ceased to be an actual one; and as regards the plaintiff, no particular form is now used in substitution for it; but as regards the defendant, the form is observed of his delivering to the proper officer of the court a memorandum containing the name of his solicitor,

(*x*) Ord. i. (1883), r. 1; ii. (1883), r. 1.

(*y*) In the present work, no attempt is made to set out all the details of *practice;* for these it will be necessary to consult the Treatises which are compiled for that purpose; and, in particular (so far as the subject of the present chapter is concerned), Chitty's Arch. Pr. of the Q. B. Div.

or stating that he defends in person (*z*),—this appearance being previously commanded by a *writ*, (or mandate from the sovereign,) which is termed, in technical language, the *process* in the action.

The process in antient times comprised a variety of different writs, of different degrees of stringency, issued consecutively upon each other, where the first for any reason failed to be effectual (*a*); but it always began with an *original writ*,—which was an instrument issuing out of Chancery, in the name of the sovereign, under the Great Seal, (instead of being merely under the seal of the court of common law itself, as was usual with other process,) commanding the sheriff to require the defendant to appear in the court of common law, to answer to some particular cause of action in the writ set forth. This mode of commencing a suit was antiently in universal use, and was of remote antiquity; and great technical importance used to attach to this writ; for, constituting from time immemorial the first step in the action, and always setting forth, (in general or special terms according to the nature of the case,) the circumstances upon which it was founded, it had incidentally the effect of defining the scope and number of our legal remedies themselves,—it having been held that no action would lie, unless the case was one for which a precedent could be found in the *Register of Original Writs*. Thus, the law of writs, (that is, of original writs,) became in effect identical with that of actions; and the same remedy was described indifferently as a *writ* of trespass, (for example,) or of dower,—or as an *action* of trespass, or of dower. In course of time, however, new modes of commencement were devised, by connivance of the judges, in order to avoid the expense of an original

(*z*) See Ord. xii.

(*a*) All these writs fell under the common term, the *process;* and those subsequent to the first (or original) writ were also called the *mesne process*,—to distinguish them from the original writ, and also from writs of execution, which latter writs were termed the *final process*.

writ (for which a fine or fee, of considerable amount, was in many cases payable to the crown); and with the view, also, of enabling the Court of Queen's Bench and the Court of Exchequer to effect that encroachment or usurpation on the jurisdiction of the Court of Common Pleas, to which we have referred in a former part of this volume (*b*); and a variety of writs of different descriptions, by way of alternatives for the antient course of suing out an original writ under the Great Seal, came into use,—with the result, however, of involving the first stages of an action in great and unnecessary complexity; which complexity led, in 1829, to the passing of the 2 & 3 Will. IV. c. 39, an Act for the adoption of a simple and more uniform procedure in actions.

But the system then devised, though it comprised many capital improvements, was afterwards found insufficient; and was therefore itself amended by the 15 & 16 Vict. c. 76 (called the Common Law Procedure Act, 1852); and subsequently by the 17 & 18 Vict. c. 125 (called the Common Law Procedure Act, 1854,) and by the 23 & 24 Vict. c. 126 (called the Common Law Procedure Act, 1860) (*c*); and according to the method of proceeding established by these Acts,—which in part retained, and in many important respects innovated upon, the antecedent practice,—an action was directed to be commenced (*d*) by

(*b*) Vide sup. pp. 367, n. (*f*), and 371, n. (*o*).

(*c*) Justice *v.* Mersey Steel and Iron Company, 1 C. P. D. 575.

(*d*) Sometimes, before commencing an action or prosecution, some certificate (Glen *v.* Grey, 21 Ch. Div. 513); or some notice (Flower *v.* Low Leyton, 5 Ch. Div. 347) is (or used to be) a necessary preliminary, *e.g.*, in the case of an action against a constable (Bryson *v.* Russell, 14 Q. B. D. 720); but in general, no such notice was (or is) required (Goodhart *v.* Hyatt, 25 Ch. Div. 182; Upmann *v.* Forester, 24 Ch. Div. 241; Wittmann *v.* Oppenheim, 27 Ch. Div. 260),—unless under the provisions of some particular statute; and now, under the 56 & 57 Vict. c. 61, as against public authorities and their officers, notice (even when prescribed by statute) is no longer required. The plaintiff must, however, also see to it, that his right of action is complete, before he issues his writ or other originating process (Frost *v.*

a writ of summons in a prescribed form—viz. by a writ issued out of the proper office (*e*), in the queen's name, directed to the intended defendant, and commanding him to cause an *appearance* to be entered for him in court, in an action at the suit of the plaintiff, within eight days after the writ should be *served* upon him (*f*). Under those Acts, the writ was also required to be indorsed with the name and place of abode of the plaintiff's solicitor; and, where he was agent for another solicitor, with the name and place of abode of the latter also: or if no solicitor was employed, then with a memorandum that it was sued out by the plaintiff in person, mentioning particularly his place of residence (*g*); and with regard to the above particulars, no change has been made by the Judicature Acts; but in addition thereto, the writ of summons is now also required to be indorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action; and it is to specify the Division of the High Court to which it is intended that the action shall be assigned (*h*).

Knight, Law Rep., 7 Exch. 111; Synge *v.* Synge, (1894) 1 Q. B. 466).

(*e*) Under the Judicature Acts, *district registries* of the Supreme Court (the registrar being, generally, also the registrar of the county court held in the same place) are established in the country, in places and districts defined by Order in Council; in which may be issued writs of summons, and other proceedings taken, such as are prescribed in the rules, down to and including entry for trial; or (in case of non-appearance by defendant, and in some other cases) down to and including entry of final judgment. The proceedings, however, on the application of any of the parties, may be directed by the High Court or a judge at chambers to be removed from the district registry to the proper office of the High Court; and, on the other hand, accounts and inquiries may be referred by the High Court to the district registrar. As to such district registries, see 36 & 37 Vict. c. 66, ss. 60—66; 38 & 39 Vict. c. 77, s. 13; 39 & 40 Vict. c. 59, s. 22; Order in Council, 12th August, 1875.

(*f*) See 15 & 16 Vict. c. 76, s. 2, sched. (A).

(*g*) Sect. 6.

(*h*) Ord. ii. r. 1; Ord. iii. r. 1. The plaintiff may assign his cause or matter to any one of the Divisions of the High Court which he may think fit; and all subsequent proceedings thereon will take place

Moreover, if the action was brought for payment of any *debt* or liquidated demand only, the amount of the debt and costs claimed was required by the Common Law Procedure Acts (and is still required by the Judicature Acts) to be indorsed thereon, with a notice that if the amount be paid to the plaintiff or his solicitor within four days after the service, further proceedings will be stayed (*i*). And it is in the option also of the plaintiff, in any case where his claim is of that nature, arising upon a contract express or implied, to make a *special* indorsement (under Order III. rule 6) of the *particulars* of his claim, after giving credit for any payment or set-off,—a course the advantage of which will presently appear (*k*); and the remedy by special indorsement on the writ of summons has been extended also to the case of a landlord seeking to recover possession from his own tenant (or the sub-tenant of the latter), where the term of the tenancy has expired, or has been duly determined by notice to quit.

In suing out the writ, care should of course be taken that it is between the proper *parties;* in other words, that it is a writ between such persons as ought to be respectively plaintiff or plaintiffs, and defendant or defendants; as to which, the rule formerly was rigid, viz., that *all* such persons, and, on the other hand, *no other* such person, must be joined. A mistake, however, in this matter, though it may cause expense to the plaintiff, does not now defeat

therein; but if he assigns it improperly, according to the rules of court and the provisions of the Judicature Acts, it may at any stage be ordered to be *transferred* to the proper Division; and a plaintiff shall not select the Probate, Divorce, and Admiralty Division, unless he would, before those Acts came into operation, have been entitled to sue in one of the courts, the jurisdiction whereof was transferred to such Division. (See 38 & 39 Vict. c. 77, s. 11; Ord. v. r. 5.)

(*i*) 15 & 16 Vict. c. 76, s. 8; Ord. iii. r. 7. With respect to the indorsements mentioned in the text, their omission does not render the writ *void;* it is only an irregularity, rendering the writ liable to be set aside or amended. (See 15 & 16 Vict. c. 76, s. 20; Ord. lxx. r. 1.)

(*k*) 15 & 16 Vict. c. 76, s. 25; Ord. iii. r. 6.

the action; for, under the Judicature Acts, all persons may be joined as plaintiffs in an action in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative; and judgment may be given for such one or more of the plaintiffs as may be found entitled to relief, for such relief as he or they may be entitled to, without any amendment; but the defendant, though unsuccessful, shall be entitled to his costs occasioned by a misjoinder, unless the court shall otherwise direct (*l*). And no action shall be defeated by reason of the misjoinder of parties, but the court may deal with the matter in controversy,—so far as regards the rights and interests of the parties actually before it; and either may at any stage of the proceedings order any parties, plaintiffs or defendants, to be struck out; or may order any parties to be added, who ought to have been joined or whose presence may be necessary, in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the action (*m*); but a plaintiff may only be joined, if he consent.

The writ of summons remains in force for twelve months, including the day of its date; at any time before the expiration of which, supposing the writ not to have been yet served after reasonable efforts, the plaintiff may get leave to *renew* it (in order to keep the suit alive) for six months; and such leave may be given as often as there may be occasion,—all renewals of the writ being effected by the simple method of procuring a stamp to be impressed upon it by the proper officer (*n*). Moreover, one or more *concurrent* writs may be issued at any time within the first period, and will remain in force to the end thereof, and are capable, like the primary one, of being renewed,—these being in the same form with the primary one, except that

(*l*) Ord. xvi. r. 1.

(*m*) Ibid. r. 11.

(*n*) Ord. viii. r. 1; Davies *v.* Garland, 1 Q. B. D. 250; Doyle *v.* Kauffman, 3 Q. B. D. 7; In re Manchester Economic Building Society, 24 Ch. Div. 488.

they have the word "concurrent" impressed upon them by the proper officer (*o*),—and being intended for the convenience of a plaintiff, who, in the case of several defendants residing in different places, or of a sole defendant whose residence is unknown, may wish to be supplied with several writs of the same tenor, with a view to contemporaneous service, or attempts at service, in different localities.

The writ, either primary or concurrent, (duly renewed, if renewal has become necessary,) must, as the general rule, not only be served on the defendant, but the service of it must, (where practicable,) be a *personal* one (*p*); that is to say, a copy of the writ must be left with him, showing him at the same time the writ itself, if he so requires (*q*); but the writ need not be served, when the defendant by his solicitor agrees to accept service, and enters an appearance (*r*); and in other cases, if it be made to appear, by affidavit, that the plaintiff is, from any cause, unable to effect prompt personal service, the court or judge may make such order for substituted or other service, or for the substitution of notice for service, as may seem just (*s*). Moreover, whenever the whole subject-matter of the action is land situate within the jurisdiction; or any act, deed, will, contract, obligation, or liability affecting land situate within the jurisdiction, is sought to be construed, rectified,

(*o*) Ord. vi. r. 1.

(*p*) 15 & 16 Vict. c. 76, s. 17; Ord. ix. r. 2.

(*q*) Goggs *v.* Lord Huntingtower, 12 Mee. & W. 503; Christmas *v.* Eicke, 6 D. & L. 40. If the writ be issued against a corporation aggregate, it may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of the corporation; if against the inhabitants of a hundred or other like district, on the high constable or one of the high constables; if against the inhabitants of any franchise, liberty, city, town, or place not being part of a hundred or other like district, on some peace officer thereof. (15 & 16 Vict. c. 76, s. 16; Ord. ix. r. 8; Walton *v.* Universal Salvage Company, 16 Mee. & W. 438.)

(*r*) Ord. ix. r. 1.

(*s*) Ibid. r. 2; Pollock *v.* Campbell, 1 Ex. D. 50; Sloman *v.* Government of New Zealand, 1 C. P. D. 563.

set aside, or enforced in the action; and whenever any relief is sought against any person domiciled or ordinarily resident within the jurisdiction; and whenever the action is for the administration of the personal estate of any deceased person who, at the time of his death, was domiciled within the jurisdiction, or for the execution (as to property situate within the jurisdiction) of the trusts of any written instrument of which the person to be served is a trustee, which ought to be executed according to the law of England; and whenever the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or in Ireland; and whenever an injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof; and whenever any person out of the jurisdiction is a merely formal co-defendant,—in each and all of these cases (but in no others), service or notice of the writ may be allowed by the court or a judge to be effected or given, *out of the jurisdiction of the court* (*t*). But as regards service of the writ in Scotland or in Ireland, it is expressly provided, that upon the application for leave to serve same, if it shall appear to the court or judge that there may be a concurrent remedy in Scotland or in Ireland (as the case may be), the court or judge shall have regard to the comparative cost and convenience of proceeding in England, or in the place of residence of the

(*t*) Ord. xi. r. 1; but in exercising his discretion in the matter of an application (in the case of a contract) to effect service or give notice of the writ out of the jurisdiction, the judge shall have regard to the amount or value of the property in dispute, and to such other circumstances as are specified in the Rules. (See Ord. xi. r. 4; Woods *v.* M'Innes, 4 C. P. D. 67; Ex parte M'Phail, 12 Ch. D. 632; Tottenham *v.* Barry, ib. 797; Bustros *v.* Bustros, 14 Ch. D. 849; Fowler *v.* Barstow, 20 Ch. D. 240.)

defendant or person sought to be served, and, particularly in cases of small demands, to the powers and jurisdiction, under the statutes establishing or regulating them, of the Sheriff's Courts or Small Debts Courts in Scotland, and of the Civil Bill Courts in Ireland respectively (*u*).

Supposing personal service to be effected in the ordinary course, and no appearance to be entered by the defendant pursuant to the exigency of the writ,—or supposing an order dispensing with personal service and substituting some other mode of service to be obtained, and no appearance entered,—then, in either case, if the writ has a *special indorsement of particulars* under Order III., rule 6, or if the indorsement, although not special, is for a liquidated demand, the plaintiff is entitled, on filing an affidavit of service of the writ of summons, to sign final judgment as *for want of appearance* (*x*); and the judgment, when the claim is for a debt or liquidated sum of money, will be for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified (if any), or (if no rate be specified) at the rate of five per cent. per annum to the date of the judgment, and costs (*y*); and where the

(*u*) Agnew *v.* Usher, 14 Q. B. D. 78; Williams *v.* Cartwright, (1895) 1 Q. B. 142.

(*x*) Ord. xiii. r. 3, grounded on 15 & 16 Vict. c. 76, s. 27. Prior to that enactment, until a defendant had *appeared*, no judgment in the action could be awarded; and if he failed to appear after a personal service had been effected, the plaintiff caused an appearance to be entered for him (commonly known as an appearance *sec. stat.*, from its having been authorized by 12 Geo. 1, c. 29); and where personal service was impracticable, the plaintiff used to obtain leave to take out a writ of *distringas* against the defendant's goods; and where he had no goods to be seized, and was returned *non est inventus*, the plaintiff then sued out process of *outlawry* against him; under which process, if the defendant (after being duly *exacted* and *proclaimed*) became an *outlaw*, all his property was forfeited and seized into the hands of the crown; and the Court of Exchequer thereupon made an order to apply it in satisfaction of the plaintiff's claim; but process of outlawry, in civil proceedings, has now been abolished (42 & 43 Vict. c. 59).

(*y*) As to *interest* in such cases, see Rodway *v.* Lucas, 10 Exch. 665; Paxton *v.* Baird, (1893) 1 Q. B. 139.

claim is by a landlord for the recovery of the possession of land (the defendant being his own tenant, or a sub-tenant of such tenant), the judgment is for the recovery of such possession, with or without (according to the tenor of the indorsement of claim) mesne profits, arrears of rent, or damages for breach of contract (*z*). All judgments for default of appearance to the writ will, however, be set aside, upon terms; at least, in general (*a*). And if the defendant *does* appear to a writ specially indorsed,—the plaintiff may, under Order XIV. rule 1, on an affidavit made by himself, or by any other person who can swear positively to the debt or cause of action, verifying the same, and stating that in his belief there is no defence to the action, call on the defendant to show cause why the plaintiff should not be at liberty to sign final judgment; and the court or judge may order judgment to be so signed, unless satisfied, on the hearing of such application, that there is a good defence on the merits, or unless sufficient facts be disclosed, to entitle the party summoned to made a defence (*b*).

If, on the other hand, the writ be *not* so indorsed as aforesaid, and the claim is for the detention of goods and pecuniary damages, and the defendant fails to appear, then the plaintiff, on filing an affidavit of service or of notice in lieu of service (as the case may be), may enter an interlocutory judgment in respect of the cause of action so disclosed, and obtain a writ of inquiry to assess the damages, or an order that they be otherwise ascertained (*c*). And here we may conveniently notice, while upon the subject of indorsements on the writ of summons, that in all cases of account (as in a partnership, or executorship, or trust account), where the plaintiff in the first instance desires to have an account taken, he is to indorse the writ with a

(*z*) Ord. xiii. rr. 8, 9; Daubuz *v.* Lavington, 13 Q. B. D. 347; Arden *v.* Boyce, (1894) 1 Q. B. 796.

(*a*) Ord. xiii. r. 10; Watt *v.* Barnett, 3 Q. B. D. 183, 363; Burgoine *v.* Taylor, 9 Ch. D. 1.

(*b*) Ord. xiv. r. 1.

(*c*) Ord. xiii. r. 5.

claim that such account be taken; in which case, in default of (or even notwithstanding) appearance (unless the court be satisfied by the defendant that there is a preliminary question to be tried), an order for the account may be forthwith made (*d*).

And here we will further observe, that by the Rules of November, 1893, a plaintiff may (in addition to the claim indorsed on his writ) indorse also a notice of his intention of proceeding to trial without pleadings; and in that case, no pleadings are to be delivered unless the judge shall (on the defendant's application) order them to be delivered (*e*). But when there is no such indorsement of the intention to proceed to trial without pleadings, or if the judge should (notwithstanding such indorsement) order pleadings to be delivered, the plaintiff in due course delivers his statement of claim,—and he must do so, if the defendant requires one, and he may do so, whether the defendant requires one or not (*f*). And as this statement is the first of a series of mutual allegations which the parties are allowed to interchange with the view to the development and exact definition of the point or points in controversy between them, (which allegations are technically called the *pleadings*,) we have thus arrived at the second stage of the action.

It will, however, be proper to advert here to a collateral incident, which may occur in the case of a defendant resident within the jurisdiction, at the time that the writ issues, but who is suspected of an intention to quit England before final judgment can be obtained; for under such circumstances, if the plaintiff can show by affidavit, to the satisfaction of a judge, that he has a good cause of action to the amount of 50*l.* or upwards, or has sustained damage to that amount, and that there is probable cause for believing that the defendant is about to quit England, and that

(*d*) Ord. iii. r. 8; Ord. xv.; Bennet *v.* Bowen, 20 Ch. D. 538; Davies *v.* Smith, 28 Ch. D. 650; Blake *v.* Harvey, 29 Ch. D. 817.

(*e*) Ord. xviii. *a*, r. 8.

(*f*) Ord. xx. rr. 1*b*, 1*d*.

his absence from England will materially prejudice the plaintiff in the prosecution of his action,—the judge may order the defendant to be arrested and imprisoned, for a period not exceeding six months, or until he has given security that he will not go out of England without the leave of the court (*g*). This order may be obtained *ex parte*, at any time between the commencement of the action and final judgment: and under it, the sheriff of the county, in which the action is to be tried, must arrest the defendant; who remains in custody on such arrest for the time ordered; or until the plaintiff shall have obtained final judgment in the action (*h*); or until the defendant shall have either given a bond to the plaintiff with two or more sureties (*i*), or else some other satisfactory security, or shall deposit in court a sum mentioned in the order by way of security; and this proceeding is in lieu of the *special bail*, which used to be given upon a writ of *capias ad respondendum* according to the practice which was in use before the Judicature Acts (*j*); and which, in the Mayor's Court of London, was known by the name of *foreign attachment* (*k*).

II. *The Pleadings.*—By the Common Law Procedure Act, 1852, (15 & 16 Vict. c. 76,) great alterations were introduced into the *pleadings* in an action; the object of the reform being, to establish a method, built indeed on the old foundations, but with an improved design as regards simplicity and despatch (*l*); and under the Judicature Acts,

(*g*) 32 & 33 Vict. c. 62, s. 6; Ord. lxix. r. 1; Drover *v.* Beyer, 13 Ch. D. 242; Colverson *v.* Bloomfield, 29 Ch. Div. 341.

(*h*) Hume *v.* Druyff, Law Rep., 8 Exch. 214.

(*i*) Betts *v.* Smyth, 2 Q. B. 113.

(*j*) Gibson *v.* Spalding, 11 Mee. & W. 173; Stein *v.* Valkenhuysen, 1 Ell. Bl. & El. 65; Levy *v.* Lovell, 14 Ch. D. 234.

(*k*) Mayor of London *v.* Joint Stock Bank, 6 App. Ca. 393.

(*l*) From a period of very remote antiquity, down to 1852, the "pleadings" were of a highly artificial character; and had been elaborated, during many successive centuries, into a regular system or science called *pleading*, or more properly *special pleading;* which was a system of high intrinsic

the rules of pleading have been again remodelled, so as to adapt them to the requirements of a tribunal, which (as already explained) has drawn to itself not only the jurisdiction of the superior courts of law, but also that of courts of equity; but the general result of the pleadings is still the same, namely, the development of the point or points in controversy between the parties, that is to say, the issues (*m*); and when this result is attained, the parties are said to be *at issue*, (*ad exitum*,) or at the end of their pleading, the emergent question being termed *the issue;* and, according to the nature of the case, such issue may be either an *issue in law* (or *in equity*) or an *issue in fact.* And for the purpose of arriving at the issue, it is a rule of pleading, that the pleadings or mutual allegations shall always consist of matters of *fact*, and of fact only—for all matters of *law* (or of *equity*) are judicially noticed by the courts; and are supposed to be known to the adverse party also, or to the pleader who conducts the supposed altercation for him: and therefore the allegations, on either side, of the facts respectively relied upon, will always suffice to develop the legal or equitable positions of the parties, and the questions of law or of equity which are in dispute between them. It is also a rule of pleading, that, in their allegations of fact, the pleaders are to abstain from any statement of the *evidence* by which the fact is to be established; for matter of evidence, though essential for the consideration of the jurors, (or other persons,) by whom the issue or question of fact is to be tried, is superfluous so far as the object of pleading is concerned,—which is merely to ascertain whether the question is matter of fact or matter of law; and if of fact, to develop it in a shape sufficiently precise to show its general nature and import—but not to determine on which side of the question the truth lies, that

value, developing the point in controversy, with the severest precision, and materially shortening the duration of the trial; but it was carried to excess.

(*m*) Thorp *v.* Holdsworth, 3 Ch. D. 639; Piercy *v.* Young, 15 Ch. D. 475.

being the province, not of pleading, but of trial (*n*). It is also a fundamental principle of pleading, that every allegation of fact in any pleading in an action, if not denied specifically or by necessary implication, or stated to be not admitted, in the next succeeding pleading of the opposite party, shall be taken (excepting as against infants or lunatics) to be admitted (*o*),—but where a reply or rejoinder merely joins issue, that is, in the general case, a sufficient general denial.

The first pleading (as has been already indicated) is the *statement of claim* (*p*); which corresponds to the old *declaration* (in the Queen's Bench Division) and to the old bill of complaint (in the Chancery Division); and the statement of claim, as well as every subsequent pleading, is *intituled* of the division of the High Court to which it is assigned, and shows also the day of the month and year when it was pleaded. In this statement, also, if the plaintiff proposes to have the action tried elsewhere than in Middlesex, he must name the county or place in which he proposes that the action shall be tried; and in that case, the action shall, unless a judge otherwise orders, be tried in the county or place so named (*q*); but when no place of trial is named in the statement of claim, then, in the absence of an order to the contrary, the action will be tried in the county of Middlesex (*r*). Under the practice formerly in use, the

(*n*) The rules of pleading under the Judicature Acts, direct that the court or a judge may, at any stage of the proceedings, strike out or amend anything scandalous, or which tends to prejudice, embarrass, or delay the fair trial of the action (Ord. xix. r. 27); and all such amendments are to be made as may be necessary, for the purpose of determining the real questions or question in controversy between the parties (Ord. xxviii. r. 1).

(*o*) Ord. xix. r. 13; Thorp *v.* Holdsworth, 3 Ch. D. 637; Tildesley *v.* Harper, 13 Ch. D. 393.

(*p*) Ord. xix. r. 2.

(*q*) Ord. xxxvi. r. 1.

(*r*) Ibid. When there is no statement of claim, a place of trial other than Middlesex may be specified in a written notice to that effect given by the defendant within six days after his appearance; or the plaintiff may have specified it in his writ of summons.

venue (that is, place for trial) in every *local* action must have been the county wherein the cause of action really arose; although, in transitory actions, the plaintiff was always allowed to lay the venue where he pleased, subject to the right of the defendant to apply to have the *venue changed* (*s*); but there is now no "local venue" for the trial of any action (*t*). The statement of the plaintiff then proceeds to allege, in a narrative form, and in distinct and numbered paragraphs, as briefly as is consistent with the nature of the case, the circumstances of his complaint and the relief or remedy which is claimed (*u*).

After the plaintiff has delivered his statement of claim (*x*), it is the defendant's turn to consider in what manner it shall be encountered; and he is to address himself to this subject in the following manner:—If the statement of claim appears on the face of it substantially insufficient, in point of law or of equity, to entitle the plaintiff to what he claims,—in other words, if it does not show any cause of action—the defendant used to *demur* (*y*); that is, used to deliver a written formula, called a *demurrer* (from *demorari*), importing that he denied such sufficiency on some ground therein stated (*z*); but as from the 24th October,

(*s*) Church *v.* Barnett, Law Rep., 6 C. P. 116.

(*t*) Ord. xxxvi. r. 1.

(*u*) Some forms of statements of claim in actions, and the appropriate subsequent pleadings, are given in Appendices (C), (D) and (E), Orders and Rules of 1883. The actions selected as specimens comprise those for "an account stated;" "on a bill of exchange;" "for false imprisonment;" "for negligence;" "for trespass to land;" and others,—including some which are in respect of actions (as, for example, "of foreclosure," or "for administration of an estate,") belonging to the other divisions of the High Court.

(*x*) If no statement of claim is delivered within the time allowed for the purpose—in a case where the plaintiff is bound to deliver one—the defendant may apply that the action be dismissed with costs for want of prosecution (Ord. xxvii. r. 1; Orrell Colliery Co., 12 Ch. D. 681).

(*y*) Metropolitan Railway Company *v.* Defries, 2 Q. B. D. 389.

(*z*) Prior to the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), a demurrer was either *general* or *special;* that is, it either objected in general terms only, or it set forth some particular objection; and by

1883, demurrers, *eo nomine*, have been abolished; and it is now provided, that, in lieu of demurrer, the defendant shall, by motion or otherwise in a summary way, raise the question of the sufficiency in law (or in equity) of the pleading (*a*). If, on the other hand, the plaintiff's statement appears *ex facie* to show a good cause of action, then the defendant's course is to *state his defence;* the general object of which is to make answer in point of *fact* to the statement of claim (*b*); and if he states no defence, within the time allowed by the practice of the court for that purpose, the plaintiff will either be entitled to enter judgment against him (*c*), or to apply to the court to give such judgment as he may be entitled to on his statement of claim, according to the nature of his claim (*d*).

The defence might formerly have been either dilatory or peremptory. Now a dilatory defence was one founded on some matter of fact not connected with the merits of the case; and defences of this nature were either pleas *to the jurisdiction*,—showing that, by reason of some matter therein stated, the case was not within the jurisdiction of the court; or were pleas of *suspension*,—showing some matter of temporary incapacity to proceed with the suit; and the effect of such a defence, if established, was that it defeated the particular action, leaving the plaintiff at liberty to commence another, if the case was such as to admit of his so doing (*e*). There might also, formerly, have been a

27 Eliz. c. 5, and 4 & 5 Ann. c. 3, all objections of *mere form* were required to be raised by way of special, and not of general, demurrer; but under 15 & 16 Vict. c. 76, s. 51, no pleading was to be deemed insufficient for any defect which could theretofore have only been objected to by special demurrer.

(*a*) Ord. xxv. rr. 1, 4; Burstall *v.* Beyfus, 26 Ch. Div. 35.

(*b*) Ord. xix. r. 2.

(*c*) Ord. xxvii. rr. 2, 4, 6, 7, 8, 9.

(*d*) Ord. xxvii. r. 11.

(*e*) Under the Judicature Acts, an action is not abated, by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of action survive or continue; and does not become defective, by the assignment, creation, or devolution of any estate or title *pendente lite;* but the "successor in interest"

defence or plea *in abatement* of the action,—one of the usual grounds for such a defence having been the non-joinder of a co-contractor; but now no plea or defence may be pleaded in abatement (*f*). Also, dilatory defences may be regarded as now obsolete (*g*), the cases being rare in which they can be of any permanent value to the defendant. On the other hand, peremptory defences, (otherwise called pleas *in bar*,) being defences founded on some matter impeaching the right of action itself, that is to say, founded upon the *merits* and tending to defeat the plaintiff's claim altogether, are still in full force and use.

The defences to an action on the *merits* are various. For, first, they may consist of a *denial* of that which is alleged by the plaintiff in his statement of claim; and under the system of pleading in use before the Judicature Acts, such defences by way of general denial comprised what were called the "general issues"; that is to say, a particular form of general denial (varying in its form according to the action itself) of the whole matter in the plaintiff's statement, or at least of the principal fact upon which his complaint was founded,—as, for example, in trespass or trespass on the case, that the defendant "was not guilty;" in debt on bond or other deed, that "it was not his deed;" in other cases of debt, that the defendant "never was indebted as alleged;" in assumpsit, that he "did not promise as alleged;" but, by the present rules of pleading, it is not sufficient for a defendant in his defence to deny generally the facts alleged by the statement of claim; but each allegation of fact, of which the truth is not admitted, must be dealt with specifically (*h*),—the general issue "*not guilty by statute*" being, however, preserved (*i*). Again,

may be ordered to be made a party to the action; and the action is then continued by or against him, or is otherwise disposed of as may be just. (Ord. xvii. rr. 1—4.)

(*f*) Ord. xxi. r. 20.

(*g*) Ord. xii. r. 30; Preston *v.* Lamont, 1 Exch. Div. 361.

(*h*) Ord. xix. r. 17.

(*i*) Edwards *v.* Hodges, 15 C. B. 477.

defences, according to their subject-matter, were either in *justification*, (*i.e.*, in *excuse*,) or *in discharge*,—a defence by way of justification or excuse showing that there was *never* any right of action;—as where, in an action for assault and battery, the defendant pleaded *son assault demesne*, viz., that it was the plaintiff's own original assault; or in an action for slander, that the words alleged to have been spoken of the plaintiff were true; and a defence by way of discharge showing that the cause of action, though once existing, had been barred by matter subsequent; as by payment, or release; or accord and satisfaction; or by *set-off;* or else by some statute of limitation.

Again, the defendant may plead by way of *counter-claim;* that is to say, he may allege that he, the defendant, has a claim against the plaintiff, for which he might bring his action; and under the Judicature Acts, it is provided, that a defendant may set off, or set up, by way of counter-claim, any right or claim which he may have against the plaintiff, whether legal or equitable, and whether sounding in damages or not; and such set-off or counterclaim is to have the same effect as a statement of claim in a cross action,—so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross claim; and where the set-off or counter-claim of the defendant is established, the court may, if the balance be in defendant's favour, give him judgment for that amount, or may otherwise adjudge to the defendant such relief as he may be entitled to, on the merits of the case (*k*).

With respect to all defences pleaded in bar of the action, it will therefore be understood, that (as the general rule) they are intended either to *traverse*,—that is, to deny,—the matter of fact in the plaintiff's statement of claim; or else to *confess and avoid* it,—that is, admitting it to be true, to show some new matter of fact tending to obviate or take

(*k*) Ord. xix. r. 3; xxi. r. 11; 36 & 37 Vict. c. 66, s. 24.

off its legal or equitable effect (*l*). Thus, in an action for an assault and battery, the defence may consist of a denial of the circumstances of the assault charged, or that any assault at all took place; or it may be to the effect that the defendant was first assaulted by the plaintiff, and merely defended himself (*son assault demesne*),—whereby the act of violence on the part of the defendant is confessed, but the legal liability *avoided* by showing circumstances of excuse or justification (*m*). There are, however, certain defences which are anomalous in this respect; *e. g.*, the defendant, in an action for a debt or liquidated demand, may avail himself of the defence of *tender;* that is, he may plead that he has been always ready to pay the demand, and that before the commencement of the action he tendered it to the plaintiff, and now brings it into court, ready to be paid to him;—or he may, in any action brought to recover a debt or damages, plead in defence *payment of money into court;* viz., that he brings a certain sum of money into court, ready to be paid to the plaintiff, and that it is enough to satisfy the plaintiff's claim (*n*); or the defendant may have occasion to raise the defence of *estoppel;* as that the plaintiff ought not to be permitted to make a particular allegation, because he has formerly done some solemn act involving an assertion to the contrary (*o*); as to all which defences, it

(*l*) Even prior to the Judicature Act, 1873, a defendant might have defended upon *equitable grounds* (17 & 18 Vict. c. 125, s. 83; Jeffs *v.* Day, Law Rep., 1 Q. B. 374).

(*m*) Ord. xix. r. 27.

(*n*) Ord. xxii.; Greaves *v.* Fleming, 4 Q. B. D. 226; Buckton *v.* Higgs, 4 Exch. D. 174; Hawkesley *v.* Bradshaw, 5 Q. B. D. 302; Heatley *v.* Newton, 19 Ch. D. 326.

(*o*) The most usual estoppel is by *deed;* and there are, besides, two other species of estoppel, namely:—estoppel by *record*, and estoppel by matter *in pais*. The first obtains in the case where any fact is alleged in a court of record, or any judgment given therein; the second, where an act is done out of court. By such matter of record, persons who were parties to the suit,—and by such matter *in pais* persons who were parties to the act in question,—are, in general, precluded from afterwards alleging matters which would be contradictory to what the record or act imports. (Plowd. 434; Co. Litt. 260, 352 a; 1 Saund. by Wms.

is evident, that they are in the nature of exceptions to the general classification above stated; for in the two first (admitting, as they do, the right of action), there is a confession, without avoidance; and in the last, there is neither traverse, confession, nor avoidance (*p*).

The statement of defence being delivered, it is then to be encountered by the plaintiff; and he is put to the same alternative as the defendant was with regard to the statement of claim; that is to say, he must either proceed as by way of demurrer thereto for substantial insufficiency of the defence in point of law or equity, or he must *reply* by pleading some matter of fact. If the plaintiff pleads instead of proceeding as if by demurrer, he must, within three weeks (as the general rule), deliver to the defendant a statement of his reply (*q*); and to such reply also the same alternative applies that was before noticed in the case of a defence, viz., that it may be in the nature of a traverse, or of a

325 a, n. (4) and (*c*); 2 Saund. by Wms. 148; Smith's Leading Cases, vol. ii. pp. 436, 460; Pargeter *v.* Harris, 7 Q. B. 708; De Mora *v.* Concha, 29 Ch. Div. 268.)

(*p*) Prior to the Common Law Procedure Act, 1852, (15 & 16 Vict. c. 76, s. 64,) it was a rule in pleading, that the defendant could not plead *specially* such matter as amounted in effect to the general issue; but he must have pleaded the general issue in terms; it being, at that time, essential to the nature of a special (or affirmative) plea, that the matter of it should be such as to give *colour* to the plaintiff's claim,—so that a plea that gave no colour ought to have been by way of traverse. *E.g.*, if, in an action of trespass, the defendant's case was that he claimed by feoffment with livery from A., by force of which he entered on the lands in question, he could not plead the matter in that form, because it would amount to a plea of *not guilty* of the trespass; and he was therefore obliged to plead not guilty. This rule, however, might be evaded, by *expressly* giving colour to the plaintiff; *e. g.*, in the case supposed, the defendant, after setting forth his own title by feoffment with livery, might proceed to allege, (by a mere fiction,) that the plaintiff, claiming by colour of a prior deed of feoffment without livery, entered; upon whom, the defendant entered; and the defendant thus referred to the judgment of the court which of the two titles was the best,—colour thus *expressly* given curing the want of implied colour, which would otherwise have vitiated the plea.

(*q*) Ord. xxiii. r. 1.

confession and avoidance, or of both (*r*). And here also may occur an occasional exception to the regular course; for the plaintiff may sometimes find it expedient to reply by way of *estoppel*, which (as already mentioned) is neither a traverse nor a confession and avoidance. Also, in other cases, the plaintiff, instead of replying at all, may find it proper to amend his statement of claim, in consequence of the nature of the defence pleaded showing that his cause of action has not been understood; and such amendment he may make, as of course and without any order for the purpose, provided he do so before replying (*s*). And we will here again remind the reader, that the plaintiff may in his reply deny generally the statements of the defence by joining issue thereon, and is not obliged to deny such statements specifically, unless so far as his reply is in the nature of a defence to the counter-claim (*t*).

To the whole of this series of pleadings applies the general rule, that neither party may (except by way of amendment) depart from or vary the claim or defence, which he has once insisted on; for such a *departure*, or inconsistent pleading, might occasion endless altercation; and therefore the reply must support the statement of claim, without raising any new ground of claim; nor may the defendant, in his answer (*scil.* rejoinder) to the reply, allege any fact inconsistent with his defence previously pleaded (*u*); *e.g.*, in a case which arose before the Judica-

(*r*) Hall *v.* Eve, 4 Ch. D. 341.

(*s*) Before the Judicature Acts, the plaintiff's course, on finding the defendant had misapprehended the cause of action as originally stated, and that consequently his defence was irrelevant, was to deliver a fresh statement *by way of new assignment;* but this practice is abolished by Ord. xxiii. r. 6.

(*t*) Ord. xxvii. r. 13; Ord. xxiii. r. 4. In the present rules of pleading, no pleadings beyond the reply are mentioned by any distinctive name; but under the former system, there was recognized a *rejoinder* on the part of the defendant to the replication; a *surrejoinder* from the plaintiff; a *rebutter* by the defendant; and a *surrebutter* on the part of the plaintiff; but if there happened to be pleadings beyond these (a very unusual case), they were not distinguished by any separate denominations.

(*u*) Ord. xix. r. 16.

ture Acts came into operation, where the claim was for the price of goods supplied to the defendant, to which the defendant made the defence of infancy, it was held that the plaintiff could not reply that the defendant represented himself to be of full age; for such reply, by converting a claim on contract into a claim based on the defendant's fraud, was a departure from his original statement (*x*); and any substantial *departure* would still be disallowed, and may be struck out as embarrassing (*y*). The rejoinder, if any, to the reply must be delivered within four days (*z*).

At some stage of this series, more or less remote, it is obvious that the parties will necessarily be *brought to issue;* for as the allegation of new matter cannot be interminable, (particularly as no *departure* is allowed,) the parties must at length arrive, either at some exception to the sufficiency of the last pleading in point of substance,—which is an issue in law or equity; or at the denial on one side of some matter of fact alleged on the other,—which is an issue in fact. In the former case, the issue of law or of equity is raised either on the pleadings themselves or by some step in the nature of the old pleading called a *demurrer;* and in the latter case, the issue of fact is raised by the delivery of a pleading called a *joinder of issue;* whereupon the pleadings are deemed to be closed (*a*); and, in fact, no pleading, *except* a joinder of issue, may be pleaded subsequent to reply, unless by leave of the court, and upon terms (*b*). Moreover, a reply (when it would be, as it usually is, a mere joinder of issue) need not be delivered at all (*c*).

The case, however, may be such as to give rise to a new series of pleadings, before the ultimate issue between the parties is attained; for it may happen, that after the defendant has pleaded, nay, even after issue joined, there

(*x*) Bartlett *v.* Wells, 1 B. & Smith, 836; Brine *v.* Great Western Railway Company, 2 B. & Smith, 402.

(*y*) Ord. xix. r. 16.

(*z*) Ord. xxiii. r. 3.

(*a*) Ord. xxiii. r. 5; Ord. xxvii. r. 13.

(*b*) Ord. xxiii. r. 2.

(*c*) Ord. xxvii. r. 13.

may arise some new matter, affording a valid defence to the action (*d*); as that the plaintiff has, since the commencement of the action, given the defendant a release, and the like; and in such cases, the defendant (or the plaintiff, if such matter arise in respect of a counterclaim) may, by leave of the court or a judge, deliver a further defence or reply, as the case may be, setting forth the same (*e*); which may be admitted by the opposite party, who is thereupon entitled, in general, to sign judgment for the costs of the action previously incurred (*f*).

With a view to clearness of statement, we have hitherto supposed that the plaintiff's statement of claim comprises only a single claim; that the defendant pleads only a single defence; and that the same character of unity pervades the whole course of the pleadings; but it is proper now to remark, that the plaintiff may have occasion to bring forward several distinct claims; and in such case, he may join them together, cumulatively, in his statement of claim (*g*). At the time when the Judicature Acts came into operation, this liberty was confined to claims in the same right and between the same parties (*h*); but it is now provided, that the plaintiff may unite, in the same action and in the same statement, several causes of action; but if it appear to the court or a judge that any of them cannot be conveniently

(*d*) Formerly, such a defence was known as a plea *puis darrein continuance*, being so named because pleaded since the last adjournment of the court,—such adjournments having been formerly called *continuances*. (Beddall *v.* Maitland, 17 Ch. D. 174.)

(*e*) Ord. xxiv. rr. 1, 2.

(*f*) Ibid. r. 3.

(*g*) Such cumulative statements used to be called *counts*. The privilege of using them formerly led to the abuse of inserting a variety of such statements, where there was in fact only *one* cause of action,—that is, of shaping a single cause of action in various modes, so that, failing to prove one, the plaintiff might have a chance of proving another; but in modern times, several counts *on the same cause of action* were not, in general, allowed.

(*h*) By 15 & 16 Vict. c. 76, s. 41, it was provided, that causes of action, of whatever kind (with the exception of replevin and ejectment), provided they were by and against the same parties, and in the same rights, might be joined in the same action (Davies *v.* Davies, 1 Hurl. & C. 451).

tried or disposed of together, separate trials may be ordered, or other order made for their being disposed of separately (*i*). So the defendant, on his side, may desire to bring forward several distinct and even inconsistent matters of defence; and as to this, the present rules of pleading place him under no restraint,—provided he does not improperly embarrass the plaintiff (*k*). It used also to be competent to the defendant to demur to part of the statement of claim, and to put in a defence to the other part; or (after obtaining leave from the court or a judge) to demur and plead to the same matter; and he may apparently still proceed as by way of demurrer, and at the same time, or afterwards (by leave), plead to the previous pleading; and the plaintiff may exercise similar rights on his part,—the same principle applying, in fact, throughout the whole series of allegations. It is obvious, therefore, that the pleading will not always lead to the production of a *single* issue only; but often to the production of *several* issues; and where the pleadings do not, in the opinion of a judge, sufficiently disclose the issues of fact in dispute between the parties, he may direct them to prepare issues, to be settled by himself (*l*).

We have said, that questions of law (or of equity), raised either on the pleadings or by a proceeding in the nature of a demurrer, are referred to the decision of the court; and that decision is given after solemn argument by counsel on both sides; and to that end, a *demurrer-book* used to be made up, containing so much of the pleadings as were

(*i*) Ord. xviii. r. 1. But (unless by leave) no cause of action can be joined with an action for the *recovery of land*, except claims for mesne profits or arrears of rent in respect of the premises claimed, and damages in respect of any contract under which they are held. (Ord. xviii. r. 2); nor (without leave) can a trustee in bankruptcy join together claims in his individual, with claims in his official, capacity (ibid. r. 3).

(*k*) Spurr *v.* Hall, 2 Q. B. D. 615; Berdan *v.* Greenwood, 3 Ex. D. 251.

(*l*) Ord. xxxiii. r. 1; Emma Silver Mining Co. *v.* Grant, 11 Ch. Div. 918; Piercy *v.* Young, 15 Ch. D. 475.

required to show the points for argument; and the demurrer was then *entered;* but now no demurrer-book is made up, and the point of law is simply argued on the pleadings on the day for that purpose appointed, or on the hearing of the demurrer-motion (*m*), or on a *special case* stated for the purpose (*n*); and after hearing counsel on either side, the court delivers its decision. For example, in an action of trespass, if the defendant in his defence confesses the fact of entry without licence, but justifies it *causâ venationis*,—for that he was hunting,—and to this the plaintiff demurs, that is, denies the justification pleaded to be a defence in law: now, on arguing this point, if the court be of opinion that a man may not justify trespass in hunting, it will allow the objection; if it thinks that he may, then it will overrule it. Or, again, if the pleadings result in an issue in equity (as where an equitable defence is set up to an action), the court, on the argument on such pleading, will decide whether there is sufficient equity in such defence, or otherwise. And, in any of such cases, if the objection be allowed, then (subject to the power of the court to allow an amendment) the matter objected to shall be deemed to be struck out of the pleadings, and the rights of the parties the same as if it had not been pleaded; and judgment may be given disposing of the whole action accordingly (*o*); and if, on the other hand, such objection should be overruled, then the court may allow the objecting party, on terms, to plead to the matter objected to. And thus is an issue of law or of equity, as on demurrer, disposed of; as to which, however, we may further remark, that if a proceeding as on demurrer to the whole of a statement of claim be allowed, the costs of the action hitherto incurred,—if overruled, the costs occasioned by it,—are generally imposed upon the unsuccessful party; and the court, in delivering its decision upon the point of law

(*m*) Johnston *v.* Johnston, 32 W. R. 1016; 33 W. R. 329.

(*n*) Ord. xxxiv.

(*o*) Ord. xxv. r. 3; Johnasson *v.* Bonhote, 2 Ch. D. 298.

(or of equity) raised, usually also makes known the *reasons* on which its decision is grounded.

III. *The Trial and Evidence.*—If the pleadings ultimately leave for trial an issue or issues of fact, it then becomes necessary to determine on which side the truth thereof lies,—a point that is not (as the general rule) left to the court itself, but to such other methods of decision as are appropriate to the particular kind of question raised thereby; and this decision of fact is what is usually understood by the term *trial*,—as to which it may be remarked, that trials, in one form or other, constitute, in every civilized country, the chief business of the courts of justice; for experience abundantly shows, that above a hundred of our actions arise from disputed facts, for one whereof the law is doubted (*p*).

Under the Judicature Acts, actions in the High Court of Justice are tried and heard, either before a judge and jury; or before a judge or judges; or before an official or special referee (*q*); and of each of these methods of trial, we will now give some account, commencing with the first, —the others being (so far as the Queen's Bench Division is concerned) of recent introduction, and exceptional only in their application (*r*).

(*p*) 3 Bl. Com. 330. Blackstone gives the following account of the state of business in his time:—"About twenty days in the year "are sufficient in Westminster "Hall to settle, upon solemn ar-"gument, every demurrer or point "of law that arises throughout "the nation; but two months are "annually spent in deciding the "truth of facts before six distinct "tribunals,—exclusive of Middle-"sex and London; which last "afford a supply of causes much "more than equivalent to any two "of the largest circuits."

(*q*) Ord. xxxvi. rr. 2—6.

(*r*) Blackstone (vol. iii. p. 330) explains the nature of various other kinds of trial in civil cases in use in his time,—1. Trial *by record*, where some matter of record (as a judgment) is alleged by one party, and the other pleads *nul tiel record;* and the point is decided by the party alleging the existence of the record being directed to bring it into court. 2. Trial by *inspection* or *examination*, where, for greater expedition, the question, being evidently

1. The first subject, then, of our inquiry will be trial by *jury*, called also trial *per pais*, or by the country,— a form of trial that hath been used time out of mind in this nation, and the origin of which is so remote that it has not been satisfactorily traced (*s*). And firstly, there are different forms of this proceeding,—the first being a trial *at bar*, that is, a trial by jury held before two or more of the judges sitting for that purpose in *banc*,—a form of trial which is comparatively rare, and which has taken place only in causes of difficulty or importance; or where the crown is concerned in interest, and insists on its right to have the cause so tried; but as between private parties, it has been allowed, only by special permission of the court (*t*). The

the object of sense, is decided by the judges themselves on the testimony of their own senses. 3. Trial *by certificate*, where the evidence of the person certifying is, by custom or otherwise, the only proper criterion of the point in dispute. 4. Trial *by witnesses* (*per testes*), where, as in the civil law, the judge is left to form his decision upon the credit he gives to the witnesses without the intervention of a jury. He also enumerates trial by *battle*, as to which vide post, vol. IV. bk. VI. chap. XVIII.; and trial by *wager of law*, as to which vide sup. p. 470.

(*s*) Blackstone (vol. iii. p. 349) considers trial by jury as having been "universally established "among all the northern nations, "and interwoven in their very con- "stitution;" and he says, that it is mentioned in England as early as in the laws of Ethelred (for which he cites Wilk. Ll. Anglo-Sax. 117), but that its first establishment among us is unknown; and, in a much later work, it is remarked, that "no record marks "the date of its commencement." (Turner's Hist. Ang.-Sax. vol. iii. p. 223, 6th edit.) The Anglo-Saxon memorials, however, when carefully examined, justify a doubt whether trial by jury did actually exist among us at any time before the Norman Conquest (Hickes, Thes. Diss. Epist.; Hallam, Mid. Ag. vol. ii. p. 396, 7th ed.; Hist. Eng. Law, by Reeves, vol. i. pp. 24, 83); and most probably, we owe the germ of this, (as of so many other of our institutions,) to the Normans. In the time of Henry the third, trial by jury had taken among us, (in substance,) the shape which it now wears; but its rudiments appear as early as the reign of Henry the second; and indeed the particular species of it, called the *grand assize*, which was appropriate to the trial of questions of *mere right*, appears to have been established by a positive law of Henry the second. (Glanv. l. 2, c. 7.)

(*t*) 11 Geo. 4 & 1 Will. 4, c. 70, s. 7; Dimes *v.* Lord Cottenham, 1 L. M. & P. 318; Ord. xxxvi. r. 9; Dixon *v.* Farrer, 18 Q. B. D. 43.

second form of trial by jury is that which is usually termed trial at *nisi prius*; which takes place, as already explained, either before a judge at the sittings in Middlesex (*u*), or for London; or before the judges and other commissioners of assize upon the different circuits;—and in the latter case as well as in the former, it is conducted, in effect, before a single judge only—it not being the practice for more than one judge to sit at any trial upon circuit (*x*).

When therefore an issue or issues in fact have been joined, *notice of trial* must be given by one or other of the parties before the action can proceed further; and with regard to this, it has been provided, that the plaintiff may, with his reply, or at any time after the *close of the pleadings*, give such notice,—specifying therein one of the modes of trial already mentioned (*y*); and if after a certain time

(*u*) Sittings for the trial by jury of causes and questions or issues of fact, were to be held in Middlesex and London (so far as reasonably practicable, and subject to vacations), continuously throughout the year, by as many judges as the business to be disposed of rendered necessary (36 & 37 Vict. c. 66, s. 30); but by Order in Council (22nd May, 1883), all London actions were afterwards directed to be tried in Middlesex simply; however, still more recently, by the 54 & 55 Vict. c. 14, the sittings in London for the trial of London jury cases were revived,—but only to be again discontinued.

(*x*) It may be mentioned, that a trial by jury in certain actions pending in the superior courts used also occasionally to take place before some judge of an inferior court of record or before the under-sheriff (or in London before one of the sheriff's *secondaries*), on a *writ of trial* directed to such judge or sheriff, under 3 & 4 Will. 4, c. 42, s. 17; and though that enactment was repealed by 30 & 31 Vict. c. 142, s. 6 (which in its turn has been repealed by 51 & 52 Vict. c. 43, but re-enacted in substance by sect. 65 of that Act), its place has been supplied by the provisions of the Acts, which enable a defendant, in certain cases, to obtain an order that the action be tried in one of the county courts. Moreover, after judgment by default, in an action for unliquidated damages, the amount of damages is usually *assessed* by a jury under a *writ of inquiry*.

(*y*) Ord. xxxvi. rr. 2, 6. It is to be noticed, that either party may insist on matters of fact being tried before a jury when the action is for slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise of marriage (Ord. xxxvi. r. 2); but that, in other actions in the Queen's Bench Division, the action is now usually

(that is to say, as the general rule, within six weeks from the close of the pleadings) he fails so to do, the defendant may do so himself; or, at his option, may apply to the court or judge to dismiss the action for want of prosecution (*z*). As the general rule, the notice, by whichever party given, must allow the interval of ten days, unless the opposite party consents to "short"—that is to say, to a four days'—notice (*a*).

The next step is to *enter the cause for trial* (which, as the general rule, is done by the party giving notice of trial), and at the same time making up and *delivering to the proper officer a copy of the whole of the pleadings* in the action—written or printed, as the rules of court direct (*b*), —which copy of the pleadings, thus made up and delivered, constitutes what used to be called the *Nisi Prius Record.*

The jury to try the issue or issues of fact raised by the pleadings, is constituted as follows:—A precept is issued, directing the sheriff to summon a sufficient number of jurors for the trial of all issues, whether civil or criminal, which shall come on for trial at the next assizes, or at the next sittings of the court, as the case may be; and a printed panel, or slip of parchment, containing the names of the jurors summoned in obedience to such precept, is made out by the sheriffs, and kept open for public inspection; and a copy of it is (or used to be) annexed to each record entered for trial at those assizes or sittings,—the panel containing the names, abodes, and additions of a number of jurors, not less than forty-eight nor exceeding seventy-two, taken from the *jurors' book;* which book, by the County Juries Act, 1825 (6 Geo. IV. c. 50), amended by the Juries Act, 1870 (33 & 34 Vict. c. 77), has been annually made out in each county,

tried without a jury,—subject always to the control of the judge, who may by special order direct the mode of trial (Ord. xxxvi. rr. 5, 6).

(*z*) Ord. xxxvi. r. 12. A trial thus brought on by the defendant used, at one time, to be called a *trial by proviso;* as to which see 3 Bl. Com. 357.

(*a*) Ord. xxxvi. r. 14.

(*b*) Ibid. r. 30.

from lists returned (from each parish), by the churchwardens and overseers (of persons therein qualified to serve as jurors) (*c*).

The course above described, however, applies only in cases where the trial is intended to be by a *common* jury; that is, a jury consisting of persons who possess only the ordinary qualification in point of property, to which we shall have occasion hereafter to refer; but it is in the option, either of plaintiff or defendant, to have the cause tried by a *special* jury; viz., a jury consisting of persons who (being on the jurors' book) are of a certain station in society; viz., esquires or persons of higher degree, or bankers or merchants; or who shall occupy a house or other premises of a certain rateable value (*d*). And to provide for *country* causes to be tried by special jury, the sheriff is further directed to summon a sufficient number of special jurymen, to try all of such causes at the then approaching assizes,—a printed panel of the special jurors so summoned being kept in the sheriff's office for public inspection; and a copy of it annexed to each record, in the same manner as in the case of common jurors (*e*). But with respect to Middlesex (or *town*) causes, the practice has been somewhat different; for where any such cause is to be tried by a special jury, due notice thereof having been given, recourse has been had, by the sheriff, to the *special jurors' list*,—a list which is annually made out by him of persons qualified to act as special jurors (*f*); and tickets corresponding with the names of the

(*c*) It may be noticed, that by 6 Geo. 4, c. 50, the lists were ordered to be made out by annual *precepts* issued by the high constables of the county; but by 25 & 26 Vict. c. 107, the duties of the high constables in this particular were transferred to the *clerk of the peace*.

(*d*) See 33 & 34 Vict. c. 77, s. 6; Vickery *v.* London, Brighton, &c. Rail. Co., Law Rep., 5 C. P. 165.

(*e*) No special jury need, however, be summoned by the sheriff, unless he has received notice to do so from one of the parties; and the fact of being marked as a special juror, is no exemption from the liability to serve on common juries.

(*f*) 6 Geo. 4, c. 50, s. 31.

jurors on this list being put into a box and shaken, the officer takes out forty-eight (*g*); to any of which names either party may object for incapacity; and supposing the objection to be established, another name is substituted; and these forty-eight names having at a subsequent period been reduced to twenty-four, by striking off such as each party shall in his turn wish to be removed, the twenty-four are accordingly summoned, and their names are placed upon a panel,—to be kept for inspection, delivered out, and a copy annexed to each record, as in country causes (*h*); and this method is commonly described as *striking* a special jury (*i*); but, by the Juries Act, 1870 (33 & 34 Vict. c. 77), it has been enacted, that it shall be resorted to only, for the future, in compliance with the order of the court or a judge; and in other cases, special jurors are summoned, at the option of either party, in the same manner in all respects as in country causes (*k*). And here let us [observe with Sir Matthew Hale (*l*), how admirably this constitution, in these first preparatory stages, is adapted and framed for the investigation of truth, beyond any other method of trial in the world,—the person returning the jurors being a man of fortune and consequence and not liable to be tempted to commit vulgar errors;] the parties having by inspection of the panel notice of the sufficiency or insufficiency of the jurors, and of their characters, connexions, and relations, that so they may be challenged upon just cause; and the persons before whom the trial is held being the judges or commissioners appointed by the crown,—[persons whose learning and dignity secure their jurisdiction from contempt; and the novelty and very parade of whose appearance at the assizes have no small influence upon the multitude, and who are in general strangers in the county, and wholly free from local influences or bias, unlike the justices of the

(*g*) 15 & 16 Vict. c. 76, s. 110.
(*h*) Ibid.
(*i*) 6 Geo. 4, c. 50, s. 32.
(*k*) 33 & 34 Vict. c. 77, ss. 16—18.
(*l*) Hist. C. L. c. 12.

[peace who are resident on the spot. Moreover, the judges, though varied at every assize, are all sworn to the same laws, have had the same education, have pursued the same studies, converse and consult together, and communicate to each other their decisions and resolutions,—whereby the administration of justice is kept uniform (*m*);] and the excellence of the existing system in these respects is so universally acknowledged, that the Judicature Acts expressly provide, that nothing therein contained, nor in the rules of court to be made thereunder, shall affect the law as to jurymen or juries (*n*).

Let us now suppose the action to be called on in court, and both parties to appear (*o*). The pleadings as delivered are then handed to the judge to peruse, that he may observe what issues the parties are to maintain and prove: and in the meantime, the jury is being *called* and *sworn*. Now the calling of the jury consists in successively drawing out of a box, into which they have been previously put, the names of the jurors on the panel annexed to the record, and calling them over in the order in which they are so drawn (*p*); and the twelve (*q*) persons whose names are first called,

(*m*) The establishment in modern days of provincial County Courts, under the superintendence of judges not in immediate communication with the judges of the High Court of Justice (though subject to their correction, in cases over a certain amount, in matters of law), is not to be considered as any disparagement to these remarks; but as a sacrifice made, in comparatively unimportant causes, to the great objects of economy and expedition.

(*n*) 38 & 39 Vict. c. 77, s. 20.

(*o*) If the plaintiff appears, but not the defendant, the plaintiff may prove his claim so far as the burthen of proof lies on him; and then ask for judgment (Ord. xxxvi. r. 31); and on the other hand, if the plaintiff fails to appear, the defendant may ask for judgment dismissing the action (ibid. r. 32); but in either of such cases, the trial may be adjourned by the judge; or the verdict or judgment afterwards set aside on terms (ibid. r. 33).

(*p*) 6 Geo. 4, c. 50, s. 26; 15 & 16 Vict. c. 76, ss. 108, 110; 33 & 34 Vict. c. 77, s. 16.

(*q*) In this number "twelve," Blackstone (vol. iii. p. 366, citing Co. Litt. 155) says: "Lord Coke "has discovered abundance of "mystery;" and he proceeds to remark, that Dr. Hickes, who attributes the introduction of this

and who appear, are sworn as the jury,—unless some just cause of challenge or excuse, with respect to any of them, shall be brought forward. It sometimes happens, however, (particularly in actions for the recovery of land, or for trespass to land,) that, on the application of one of the parties before the trial, an order has been obtained, directing that a *view* shall be had, by certain of the jurors on the panel, of the messuages, lands, or place in question: in which case, six or more of the jurors, to be agreed on by the parties, or nominated by the sheriff, are appointed to have the matter in question shown to them by two persons named in such rule or order; and then such of the jury as have had the view, or so many of them as appear, are sworn on the trial, previous to any other jurors (*r*).

After the jurors have appeared, and before they are sworn, they are liable to be *challenged* by either party, such challenges being of two sorts; either (1) to the *array*, or (2) to the *polls*. And, firstly, a challenge to the array is an exception to the whole panel in which the jury are arrayed, or set in order, by the sheriff; and it may be made upon account of partiality or some default in the officer who arrayed the panel,—as if he be a party to the suit, or related by either blood or affinity to either of the

number to the Normans, tells us that among the inhabitants of Norway a great veneration was paid to the number *twelve*,—"*Nihil sanctius, nihil antiquius fuit; perinde ac si in ipso hoc numero secreta quædam esset religio.*" Mr. Hallam also (Hist. Mid. Ag. vol. ii. p. 401, 7th ed.) remarks upon the veneration with which this number was regarded in Scandinavia generally; and he observes, that Spelman (Glossary, voce *Jurata*) has produced several instances of the regard paid to twelve in the early German laws.

(*r*) 3 Bl. Com. 358. The 17 & 18 Vict. c. 125, s. 58, provided that either party to an action might apply for the *inspection* by the jury, or by himself, or by his witnesses, of any real or personal property, the inspection whereof was material to the determination of the question in dispute; and the Judicature Acts have provided that a *view* of the property may be had by the judge himself (Ord. l. r. 4); or by the jury (Ord. l. r. 5); or by the parties (Ord. l. r. 3); or by the official referee (Ord. xxxvi. r. 48).

parties; also, though there be no personal objection against the sheriff, yet if he arrays the panel at the nomination or under the direction of either party, this is a good cause of challenge to the array (*s*). And, again, a challenge to the array may be either by way of *principal* challenge, or by way of challenge *to the favour*,—the former being on one of the direct grounds above described; the latter, on grounds that imply only a probability of bias or partiality,—one example instanced in the books being where the son of the sheriff had married the daughter of the adverse party (*t*); and there seems to be this practical difference between them, that the first, if sustained in point of fact, must be allowed as of course, while the allowance of the latter is matter of judgment and discretion only (*u*). If the challenge be controverted by the opposite party, it is to be left to the determination of two *triors* appointed by the court (*x*); and if these decide in favour of the objection, the array is quashed, and a new jury impanelled by the coroner (*y*); who in this, as in

(*s*) Formerly, if a lord of parliament had a cause to be tried, and no *knight* was returned upon the jury, it was a cause of challenge to the array (Co. Litt. 156 a; Selden, Baronage, ii. 2); but this objection is now taken away (6 Geo. 4, c. 50, s. 28). At one time, the array might be challenged for want of *hundredors*,—an objection founded on the early practice of our law, by which the jurors, in the origin of the institution of trial by jury, were summoned altogether *de vicineto*, and were indeed in the nature of *witnesses*, rather than of judges; but the necessity for the hundredors was, by successive statutes, gradually abolished (4 & 5 Anne, c. 3; 6 Geo. 4, c. 50, s. 13). The array might also formerly have been challenged, if an *alien* were party to the proceedings, and if, (after that fact was established and application made to the court for the purpose,) the sheriff did not return a jury *de medietate linguæ*, that is, a jury one half of which consisted of aliens, supposing so many to be found in the place; but this jury *de medietate* was done away with, in civil actions, by the effect of 6 Geo. 4, c. 50, ss. 3, 47; and, in other cases, by 33 & 34 Vict. c. 14, s. 5.

(*t*) Co. Litt. 156 a.

(*u*) Ibid.; 3 Bl. Com. 363.

(*x*) A principal challenge may be tried by the court itself without the intervention of triors (Mayor of Carmarthen *v.* Evans, 10 Mee. & W. 274.)

(*y*) Newman *v.* Edmonds, 1 Bulst. 114; 2 Hale, P. C. 275; R. *v.* Ed-

some other instances, acts as a substitute for the sheriff, where exception on any ground is taken to the latter (*z*).

Secondly, [challenges to the polls (*capita, i. e.*, individuals) are exceptions to particular jurors, and seem to answer to the *recusatio judicis* in the civil and canon laws; by the constitution of which, a *judex* might be refused upon any suspicion of partiality (*a*). By the laws of England also, in the times of Bracton and Fleta, a judge might be refused for good cause (*b*); but now the law is otherwise, and it is held that judges and justices cannot be challenged (*c*); for the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose conduct upon the judgment seat is under the immediate check of public observation; and should the fact at any time prove flagrantly such as the delicacy of the law will not presume beforehand, there is no doubt but that such misbehaviour would draw down a heavy censure from those to whom the judge is accountable for his conduct.] But challenges to the jurors themselves (who are judges of fact only, and are merely private persons) do not fall under the same principle, and are consequently allowed; and such challenges are reduced by Sir E. Coke to four heads, namely, —*propter honoris respectum; propter defectum; propter affectum;* and *propter delictum* (*d*) :—

1. *Propter honoris respectum; e. g.*, if a lord of parliament be impanelled on a jury, he may be challenged by either party; just as he may excuse himself, as exempted by law (*e*).

monds, 4 B. & Ald. 471. If any exception be taken to the *coroner*, the jury is to be arrayed by two persons named by the court and sworn to the discharge of their duty,—which two persons are called *elisors* or electors; and no challenge is allowed to their array. (3 Bl. Com. 355; Fortesc. de Laud. LL. c. 25; Co. Litt. 158.)

(*z*) Bl. Com. ubi sup.

(*a*) 3 Bl. Com. 361; Cod. 3, 1. 16; Decretal. l. 2, t. 28, c. 36.

(*b*) L. 5, c. 15; L. 6, c. 37.

(*c*) Co. Litt. 294.

(*d*) Ibid. 156 b.

(*e*) 6 Geo. 4, c. 50, s. 2; 33 & 34 Vict. c. 77, *in sched.*

2. *Propter defectum; e. g.*, if a juryman be an alien born, and neither domiciled in this country nor naturalized, this is defect of birth and ground for challenge (*f*). In connection with which, we may notice the defect of sex—no female being capable of serving on a jury (*g*); and the defect of age. But the principal deficiency is defect of estate,—the qualification of an ordinary juror in respect of estate (and which formerly depended on a variety of statutes) now depending on the County Juries Act, 1825 (6 Geo. IV. c. 50) (*h*); by which statute, the general qualification of a common juror, both as to age and as to property, is as follows:—He must be between twenty-one and sixty years of age; and he must have, within the county in which he resides and in which the action is to be tried, in his own name, or in trust for him, 10*l.* by the year, above reprises, in lands or tenements of freehold, copyhold, or customary tenure or of antient demesne; or in rents issuing out of such lands or tenements; or in such lands, tenements, and rents taken together,—in fee simple, fee tail, or for the life of himself or some other person; or else he must have within the same county 20*l.* by the year, above reprises, in lands or tenements, held by lease for twenty-

(*f*) 6 Geo. 4, c. 50, s. 3; R. *v.* Sutton, 8 B. & C. 417.

(*g*) Except, of course, in the case of a jury of matrons, upon the writ *de ventre inspiciendo*. (6 Geo. 4, c. 50, s. 1; 3 Bl. Com. 362, et post, vol. IV. bk. VI. chap. XXI.)

(*h*) It appears from Blackstone (vol. iii. p. 362), that, by the statute of Westminster the second (13 Edw. 1), c. 38, the general qualification for juries in assizes was 20*s.* by the year; which was increased to 40*s.* by 21 Edw. 1 (Stat. de Jur.), and 2 Hen. 5, st. 2; and again doubled by 27 Eliz. c. 6, which required an estate of freehold, to the yearly value of 4*l.* at the least. But the value of money greatly decreasing, the qualification was raised, by a temporary Act (16 & 17 Car. 2, c. 3), to 20*l.* per annum; and on the expiration of that Act, was afterwards fixed, by 4 W. & M. c. 24, at 10*l.* per annum, and 6*l.* in Wales, of freehold land or copyhold; which was the first time that copyholders were allowed to serve on juries in the superior courts. In addition to which, it was afterwards provided, by 3 Geo. 2, c. 25, that any leaseholder for 500 years absolute, or for any term determinable on a life or lives, of the clear yearly value of 20*l.* over and above the rent, should be qualified.

one years or longer, or for a term of years determinable on any life or lives; or he must, at the least, be a householder, rated or assessed to the poor rate,—or to the inhabited house duty,—in Middlesex, on a value of not less than 30*l.*, or (in any other county) on a value of not less than 20*l.* (*i*); and if he does not possess one or other of these qualifications, it is a ground of challenge (*k*).

3. *Propter affectum, i. e.*, for suspicion of bias or partiality. This (as in the case of a challenge to the array) may be either a *principal* challenge or *to the favour*. And the causes of a *principal* challenge are,—that a juror is of kin, to either party, within the ninth degree (*l*); that he has been arbitrator on either side; that he has an interest in the cause (*m*); that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; or that he is the master, servant, counsellor, steward, or solicitor of the opposite party, or belongs to the same society or corporation (*n*). On the other hand, challenges to the *favour* are in respect of an objection founded on some probable circumstances of suspicion,—as acquaintance with the parties and the like (*o*). Challenges of either kind are determined, like those to the array, by *triors;* the

(*i*) 6 Geo. 4, c. 50, s. 1. The above qualifications do not apply, however, to jurors in towns corporate, or counties corporate, possessing jurisdictions of their own,—the panels of whose juries are to be prepared in manner theretofore accustomed; and as to jurors in *London* causes, the Act provided a different qualification, viz., that a juror must be a householder; or the occupier of a shop, warehouse, counting-house, chambers or offices, for the purpose of trade or commerce; within the city; and must have lands, tenements or personal estate of the value of 100*l.* (6 Geo. 4, c. 50, s. 50.)

(*k*) Sect. 27.

(*l*) Onions *v.* Nash, 7 Price, 263; Hewitt *v.* Ferneley, ib. 234.

(*m*) Bailey *v.* Macaulay, 13 Q. B. 829.

(*n*) Williams *v.* Great Western Railway Company, 3 H. & N. 869.

(*o*) Finch, L. 401. It is remarkable, that, in the *nembda* or jury of the antient Goths, there was a distinction similar to ours, as to the nature of the challenges: "*Licebat palam excipere, et semper ex probabili causâ tres repudiari; etiam plures ex causâ prægnanti et manifestâ.*"—Stiern. l. 1, c. 4.

practice here (if the challenge be to the favour) being as follows: In case the first man called on the jury be challenged, the triors must be two indifferent persons named by the court; and if they try one man, and find him indifferent, he shall be sworn; and then he and the two triors shall try the next: and when another is found indifferent and sworn, the two triors shall be superseded, and the two first sworn on the jury shall try the rest (*p*).

4. *Propter delictum*,—that is to say, for conviction of some crime or misdemeanor,—as for treason, felony, or any infamous crime,—unless the juror shall have obtained a free pardon (*q*).

Besides these challenges (which are exceptions against the fitness of jurors, and whereby they may be *excluded* from serving), there are also other causes to be made use of by the jurors themselves, which are matters of *exemption*,—whereby their service is excused, but not excluded (*r*). These exemptions (which formerly depended on various statutes, customs, and charters) now depend upon the Juries Act, 1870, (33 & 34 Vict. c. 77); and the persons exempted under that statute include the following, viz., peers; members of parliament; judges; clergymen; Roman

(*p*) Co. Litt. 158. It is said, that a principal challenge to the polls may, like a principal challenge to the array, be tried by the *court*, without the intervention of triors. (Arch. Pr. by Chitty, 13th ed. p. 393.)

(*q*) 6 Geo. 4, c. 50, s. 3; 33 & 34 Vict. c. 77, s. 10.

(*r*) It is to be observed, that a formal challenge, whether to the array or to the polls, has now become infrequent; for where the sheriff is not indifferent, the jury may be impanelled, in the first instance, by the coroner; and supposing it to be nevertheless impanelled by the sheriff, this (perhaps) would be a sufficient ground not only for a challenge, but for moving for a new trial in case of an adverse verdict (Arch. Pr. 13th ed. p. 389); and in case of any objection to a particular juror, the usual course now is, simply to intimate the objection to the proper officer of the court; who, unless the matter be disputed on the other side, will refrain from calling him; so that the learning of challenges, in civil cases at least, is (though still of importance) rarely illustrated by the modern practice of the courts.

Catholic priests; ministers of any congregation of Protestant dissenters or of Jews, whose place of meeting is duly registered, and who follow no secular occupation but that of schoolmasters; serjeants, barristers, certificated conveyancers, and special pleaders, actually practising; members of the society of Doctors of Law, and advocates of the civil law, actually practising; solicitors and proctors, actually practising and taking out their annual certificates, and their managing clerks; notaries public, in actual practice; officers of the supreme court of judicature (*s*); clerks of the peace and their deputies, actually exercising their duties; coroners, gaolers, and keepers of houses of correction, and their subordinate officers; keepers in public lunatic asylums; physicians, surgeons, apothecaries, and all registered medical practitioners, actually practising, and pharmaceutical chemists; officers of the navy, army, militia, and yeomanry, on full pay; the members of the Mersey Docks and Harbour Board; the master, wardens, and brethren of the Trinity House; pilots and masters of vessels in the buoy or light service, duly licensed; servants of the royal household; officers of the post office, customs, and inland revenue; sheriff's officers; officers of the rural and metropolitan police; the metropolitan police magistrates, and their subordinate officers; members of the council and justices, and town clerks and treasurers, of municipal boroughs (so far as regards juries for the county in which the borough is situate); burgesses for boroughs with a separate quarter sessions (so far as above); a justice of the peace (so far as any sessions are concerned within the jurisdiction of which he is a justice); and officers of the Houses of Lords and Commons (*t*).

If a sufficient number of jurors do not appear, or if (by means of challenges or exemptions) a sufficient number of unexceptionable ones do not remain, either party may pray

(*s*) 36 & 37 Vict. c. 66, s. 77.

(*t*) 33 & 34 Vict. c. 77, s. 9, et sched.

a *tales*,—a tales being a supply of "*such*" men as are summoned upon the panel, in order to make up the deficiency. For this purpose, a writ of *decem tales*, *octo tales*, and the like, used, at common law, to issue to the sheriff (*u*); but the judge, trying the cause, was empowered by the 6 Geo. IV. c. 50, s. 37, at the request of either party, to award a tales *de circumstantibus* (*x*); that is, to command the sheriff to return so many other men duly qualified as should be present, or could be found, to make up the number required for making up a full jury; and to add their names to the former panel. But in the case of common jurors,—of whom seventy-two are usually returned on the same common jury panel,—it happens of course but rarely, that the whole are exhausted so as to make a tales necessary; and in special jury causes, the deficiency is, by the same statute, directed to be made up from the common jury panel, if a sufficient number can be found; but if such number be not found, there is then to be a tales *de circumstantibus*, in manner before directed (*y*).

The necessary number of twelve qualified persons being at length obtained, they are then separately sworn, if Christians, on the New Testament, and otherwise according to their own religious belief,—or they affirm instead of being sworn (*z*),—"well and truly to try the issue between the parties, and a true verdict to give according to the evidence;" and hence they are denominated the "jury," *jurati;* and the "jurors" *juratores* (*a*).

(*u*) 3 Bl. Com. 365.

(*x*) F. N. B. 166; Reg. Brev. 179.

(*y*) 6 Geo. 4, c. 50, s. 37; Gatliff *v.* Bourne, 2 M. & Rob. 100; Snook *v.* Southwood, 1 R. & M. 429; British Museum *v.* White, 3 Car. & P. 289.

(*z*) 1 & 2 Vict. c. 105; 30 & 31 Vict. c. 35; 51 & 52 Vict. c. 46.

(*a*) Blackstone remarks (vol. iii. p. 366), that the *selecti judices* of the Romans bore in many respects a remarkable resemblance to our juries,—"for they were first returned by the prætor; then their names were drawn by lot, till a certain number was completed; then the parties were allowed their challenges; next they struck what we call a tales; lastly, like our jury, they were sworn." (See Ascon. in Cic. Verr. 1, 6.)

[The jury are now ready to hear the merits; and to fix their attention the closer to the facts which they are impanelled and sworn to try, *the pleadings are opened* to them on the part of the plaintiff; and, (as a general rule,) the case is then stated by counsel on that side which holds the affirmative of the question in issue (*b*). For the issue is said to lie, and proof is always first required, upon that side which affirms the matter in question (*c*),—in which respect, our law agrees with the civil: "*ei incumbit probatio, qui dicit, non qui negat; cum per rerum naturam factum negantis probatio nulla sit*" (*d*).] The opening counsel briefly informs the jury what has been transacted in the action, up to that stage of its prosecution; explains the parties, the kind of action, the statement of claim which has been made by the plaintiff, the defence which has been set up, and the other pleadings; showing upon what point or points issues of fact have been joined, which are to be by them determined (*e*); and he then proceeds to explain to the jury the nature of the case he proposes to establish, and the evidence intended to be produced in its support; and then the evidence itself is produced; and when this has been gone through (and in some cases summed up also), the counsel on the other side opens the adverse case; and supports it, if its nature so require, by evidence; which he is also entitled to sum up; and then the party which began is heard by way of reply; but no reply is allowed, (save only in the case of the crown,) unless evidence has been given in answer to the case first stated (*f*).

(*b*) In all actions for *unliquidated damages*, the plaintiff, however, shall begin,—though the affirmative of the issue should be on the defendant. (Mercer *v.* Whall, 5 Q. B. 447; Cooper *v.* Wakley, Moo. & M. 248.)

(*c*) Calder *v.* Rutherford, 3 Brod. & Bing. 302; Evans *v.* Birch, 3 Camp. 10.

(*d*) Ff. 22, 3, 2; Cod. 4, 19, 23; Williams *v.* East India Company, 3 East, 192.

(*e*) Blackstone remarks (vol. iii. p. 367), that "formerly, the whole "record and process of the Latin "pleadings were read to the jury "in English by the court; and the "matter in issue clearly explained "to their capacities."

(*f*) The 17 & 18 Vict. c. 125, s. 18, has provided, that the party who

And here it seems proper to make some few observations on the general nature of the evidence; and to notice some of its leading rules and maxims (*g*). And, firstly, proofs or evidence, (for the terms are synonymous,) are either *written* or *parol*,—the former consisting of records, deeds, or other writings (*h*); the latter, of witnesses personally appearing in court, and (as the general rule) sworn to the truth of what they depose. And with respect to witnesses, there is a process to bring them in, by writ of *subpœna ad testificandum* (*i*); which commands them, laying aside all excuses, and on pain of forfeiting 100*l*., to appear at the trial, and give their evidence; and such writ may contain a clause of *duces tecum*,—requiring them to bring, at the same time, all such deeds or writings, in their possession or power, as the party who issues the subpœna may think material for this purpose. In the event of the non-attendance of a person so subpœnaed, and his inability to show any lawful ground of excuse, (such as that of dangerous illness,) he is considered as having committed a contempt

begins, or his counsel, shall be allowed (in the event of his opponent not announcing at the close of the plaintiff's case his intention to adduce evidence) to address the jury a second time at the close of such case, for the purpose of summing up the evidence he has adduced; and the party on the other side, or his counsel, shall be allowed to open his case, and also to sum up his evidence (if any).

(*g*) It forms one of the provisions of the Judicature Acts, that, except with reference to the power of the court for special reasons to allow depositions or affidavits to be read,—nothing therein, or in the rules to be made by virtue thereof, shall affect the mode of giving evidence by oral examination of witnesses in trials by jury, or the rules of evidence. (38 & 39 Vict. c. 77, s. 20.)

(*h*) See, as to letters of an agent, Jones *v.* Shears, 4 A. & E. 832; as to entries in parish books, Taylor *v.* Devey, 7 A. & E. 409; as to an antient survey of a manor, ib. 617; as to books of treasurer of charity, Doe *v.* Hawkins, 2 Q. B. 212; as to judgments, Christy *v.* Tancred, 9 Mee. & W. 438; as to public books not judicial, Jewison *v.* Dyson, ib. 540; Rowe *v.* Brenton, 8 B. & C. 743; and as to title deeds, Wollaston *v.* Hakewill, 3 Man. & Gr. 297.

(*i*) 17 & 18 Vict. c. 34; O'Flanagan *v* Geoghegan, 16 C. B. (N. S.) 636.

of court; and he is liable to an attachment, under which he may be imprisoned for such contempt (*k*); and an action will also lie against him, at suit of the party damnified by his absence, to recover compensation for any loss occasioned thereby (*l*). But no witness is bound to appear in court, unless his reasonable expenses for the whole period of his attendance, *eundo*, *morando*, *et redeundo*, are tendered him: nor if he there appears, is he bound to give evidence, till such charges are actually paid him; and he is also protected, during the same period, from any arrest for debt (*m*). If it be ascertained beforehand, but not otherwise (*n*), that a person required as a witness at a trial will be unable to attend, by reason of permanent sickness or infirmity, or absence in parts beyond its jurisdiction, the court is empowered, by 1 Will. IV. c. 22, to issue a commission for his examination at any place *within* or *out* of the jurisdiction (*o*): and it was, by that Act, provided, that such examination might afterwards, under certain circumstances, be read in evidence at the trial,—the circumstances justifying its being read, being, *e. g.*, the death of the witness since his deposition was taken, or his continued sickness, or infirmity, or his continued absence in parts beyond the jurisdiction of the court (*p*); but otherwise, the deposition cannot in general be used, without the consent of the party against whom it is offered (*q*). And the Judicature Acts

(*k*) Chapman *v.* Davis, 1 Dowl., N. S. 239; Ord. xxxvii. r. 8; Connell *v.* Baker, 29 Ch. Div. 711.

(*l*) Davis *v.* Lovell, 1 Horn. & Hurl. 451; Couling *v.* Coxe, 6 D. & L. 399.

(*m*) Meekins *v.* Smith, 1 H. Bl. 636.

(*n*) Mondel *v.* Steele, 8 Mee. & W. 300; Finney *v.* Beasley, 17 Q. B. 86.

(*o*) If the place where the examination is to be had is in any of the colonies or foreign dominions of the crown, the commission is addressed to a court or judge there. (22 Vict. c. 20; Campbell *v.* Att.-Gen., Law Rep., 2 Ch. App. 571.) In lieu of a commission to examine witnesses, a *request* to that effect may be made. (Ord. xxxvii. r. 6a, App. K., Nos. 37a and 37b.)

(*p*) Ord. xxxvii. r. 5; Duke of Beaufort *v.* Crawshay, Law Rep., 1 C. P. 699.

(*q*) 1 Will. 4, c. 22, s. 10. We may remark here, that 19 & 20 Vict. c. 113 has provided for the

contain a provision, that though (in the absence of an agreement between the parties and subject to rules of court) the witnesses at the trial of any cause or at any assessment of damages are to be examined *vivâ voce* and in open court, yet that any particular fact or facts may, for sufficient reasons, be ordered to be proved by affidavit, to be read at the trial on such conditions as may be reasonable; and that any witness whose attendance in court ought, for any sufficient cause, to be dispensed with, may be examined before a commissioner or examiner—unless the court or judge shall be satisfied that the other party *bonâ fide* desires the witness to be produced in court, for the purpose of cross-examining him, and also that he can be produced (*r*); and the same Acts contain also this general provision, that where it shall appear necessary for the purposes of justice, any person may be ordered to be examined upon oath, and his deposition filed and given in evidence, on such terms (if any) as shall be directed (*s*).

Also, with a view to discover the nature of the evidence required to support the case of either party, or to answer that of his opponent, and to save the necessity of being prepared with rebutting evidence at the trial itself,—the modern practice allows either party to administer *interrogatories* to the other; and by his answers to such, which are embodied in an affidavit, such party will, of course, be bound at the trial. This course may be taken by the plaintiff at the time of delivering his statement of claim (*t*); or by the defendant at the time of delivering his defence; or at any other time before the pleadings are closed; but in all cases, excepting actions for fraud or breach of trust, the leave of the court is required for the delivery of inter-

examination of witnesses in England, whose testimony is required in a *foreign* court, before which any civil or commercial matter was pending; and that 22 & 23 Vict. c. 62 contains a somewhat similar provision to ascertain the *law* in any part of her Majesty's dominions.

(*r*) Ord. xxxvii. r. 1.

(*s*) Ibid. r. 5.

(*t*) Mercier *v.* Cotton, 1 Q. B. D. 442; Hancock *v.* Guerin, 4 Exch. D. 3.

rogatories (*u*); and security for the costs of the answer thereto must be given (*x*). But the judge (or master) has, on the application at chambers of the opposite party, power to set aside or strike out interrogatories, if he thinks them unreasonably or vexatiously exhibited, or that they are scandalous (*y*); and he may also determine, whether the interrogatories are or are not put *bonâ fide* for the purpose of the action, and whether the matter inquired after is sufficiently material at that stage of the action, or as to any other objection to them taken in the affidavit in answer (*z*). Or now, under the rules of November 1893, the particular interrogatories which it is proposed to deliver being submitted to the court or judge, when the application is made for leave to deliver them, it is competent (and usual) for the court or judge to then and there determine, whether or not the interrogatories are necessary for fairly disposing of the trial (*a*), and to settle the interrogatories accordingly.

All witnesses, that have the use of their reason, are to be received and examined; but not, of course, children too young to understand the nature of an oath, or adults who, through disease or from any other cause, are incapable (*b*). But at one time, no *party* to the action was allowed, in any case, to give evidence; and persons *interested* in the testimony they were to give,—however slight that interest might be (*c*),—were also incompetent to be heard, as witnesses on the side of the question to which their interest inclined; and persons who were *infamous*, that is, of such a character that they might be challenged as jurors *propter delictum* (*d*), were wholly inadmissible as witnesses. But the principle of absolute exclusion in these cases, though once among the most settled rules of the English law, has

(*u*) Ord. xxxi. r. 1.
(*x*) Ibid. rr. 25, 26, 27.
(*y*) Ibid. r. 7.
(*z*) Ibid. rr. 6, 20.
(*a*) Ibid. r. 2.
(*b*) 1 Stark. Ev. 81.
(*c*) Doe *v.* Bramwell, 3 Q. B. 307.
(*d*) 3 Bl. Com. 370.

been gradually eradicated from it by modern Acts of Parliament; and the objection is now available only as a circumstance affecting the *credibility*, and not the *competency* of the witness. For by 6 & 7 Vict. c. 85, no person offered as a witness is to be excluded, on the ground of incapacity from interest or from crime, from giving evidence on any issue or inquiry whatever (*e*); and by 14 & 15 Vict. c. 99, the *parties* themselves are in general both competent and compellable to give evidence, though not required in general to answer any questions tending to criminate themselves (*f*); and by the Evidence Amendment Act, 1853 (16 & 17 Vict. c. 83), the wife (or husband) of any party was placed, in this respect, in the same position as the party himself, subject only to the qualification following, viz., that a husband or wife could not give evidence for or against each other in any *criminal* proceedings, and neither of them could be compelled to disclose any matters which he or she had learned by communication from the other during the marriage; also, by the Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), the parties to any action for *breach of promise of marriage*, or to any proceeding *instituted in consequence of adultery* (which were both excepted from the operation of the previous Acts), were made competent to give evidence therein (*g*); and by the 40 & 41 Vict. c. 14, on the trial of any proceeding (whether by indictment or otherwise) instituted for the purpose of trying or enforcing

(*e*) Udal *v.* Walton, 14 Mee. & W. 254; Att.-Gen. *v.* Hitchcock, 1 Exch. 91.

(*f*) The Queen *v.* Payne, Law Rep., 1 C. C. 349; Reg. *v.* Slater, 8 Q. B. D. 267.

(*g*) In re Ridout's Trusts, Law Rep., 10 Eq. Ca. 41; Bishop of Norwich *v.* Pearse, ib. 2 Ad. & Eccl. Cas. 281; M. *v.* D., 10 Prob. Div. 175. It should be noticed, that, under this Act, there must be corroborative evidence of the promise of marriage; and that, in case of a proceeding for *adultery*, no witness can be examined as to his or her having committed adultery, unless in the way of contradiction to his or her own evidence on that point; and as to the necessity of corroborative evidence in other cases, see Finch *v.* Finch, 23 Ch. Div. 267.

a *civil* right only, the defendant himself, or the wife or husband of such defendant, is an admissible witness, and is compellable to give evidence. There remained, however, still in force, one exception to the general rule: viz., that no one should be *sworn* who professed not to believe in the existence of a God by whom perjury was punished (*h*); but the Evidence Amendment Act of 1869, above referred to, contained a provision, that if any person called to give evidence in any court of justice, whether in a civil or criminal proceeding, should object to take an oath, or should be objected to as incompetent to take an oath,—such person should, if the presiding judge was satisfied that the taking of an oath would have no *binding effect on his conscience*, make a solemn promise and declaration that his evidence should be true; and that if he should, nevertheless, wilfully and corruptly give false evidence, he might be convicted of perjury (*i*); and now, the Oaths Act, 1888 (*k*), sect. 1, has provided generally, that every person, when objecting to be sworn, and stating as the ground of such objection, either that he has no religious belief or that the taking of an oath is contrary to his religious belief, may make a solemn affirmation instead of taking the oath, in all places and for all purposes, subject to the like liability to be prosecuted for perjury as in the case of falsely swearing.

The oath (which is to speak "the truth, the whole truth, and nothing but the truth,") is administered to witnesses in general upon the New Testament; but to those who do not profess the Christian faith, the oath is administered in such form as is appropriate to their creed; and by 1 & 2 Vict. c. 105, it is declared and enacted, that in all cases in which an oath is administered to any person on any occasion whatever, he shall be bound thereby, provided

(*h*) Omichund *v.* Barker, 1 Atk. 49; The Queen *v.* Whitehead, Law Rep., 1 C. C. R. 33.

(*i*) 32 & 33 Vict. c. 68, s. 4; and see 33 & 34 Vict. c. 49; and 33 & 34 Vict. c. 83.

(*k*) 51 & 52 Vict. c. 46.

it be administered in such form and with such ceremonies as he may declare to be binding; and by the Oaths Act, 1888 (*l*), sect. 5, anyone desiring to do so may swear with uplifted hand.

A witness is not bound to answer any question that tends to expose him to punishment as a criminal; or to any penalty (*m*); or to any forfeiture (*n*). But, by the 46 Geo. III. c. 37, a witness cannot refuse to answer a question relevant to the matter in issue, and the answering of which does not tend to expose him to any penalty or forfeiture, merely on the ground that his answer might tend to establish *a debt* or other *civil* liability against him.

A counsel or solicitor is not bound, or even at liberty, to divulge the secrets of the cause with which he may have become confidentially entrusted (*o*); nor can official persons be called upon to disclose any matter of state, the publication of which may be prejudicial to the community (*p*); and no questions are permitted to be asked which tend to the discovery of the channels through which information has been given to the officers of justice in criminal prosecutions (*q*). But the law compels (for example) all professional persons, whether physicians, surgeons, or divines, to divulge facts (if relevant to the issue) with which they have become professionally acquainted: and will not allow such persons, or a servant, or a private friend, to withhold

(*l*) 51 & 52 Vict. c. 46. See also 52 & 53 Vict. c. 10 (the Commissioners for Oaths Act, 1889), consolidating and amending the law as to officers (usually solicitors) before whom oaths may be taken, or affirmations made; which last mentioned Act has since been amended by 53 & 54 Vict. c. 7, and 54 & 55 Vict. c. 50.

(*m*) 14 & 15 Vict. c. 99, s. 3; Bradlaugh *v.* Edwards, 11 C. B. (N. S.) 377; The Queen *v.* Boyes, 1 B. & Smith, 324.

(*n*) Fisher *v.* Ronalds, 12 C. B. 762; Atherley *v.* Harvey, 2 Q. B. D. 524; Allhusen *v.* Labouchere, 3 Q. B. D. 654.

(*o*) Reg. *v.* Duchess of Kingston, 11 St. Tr. 246; Weeks *v.* Argent, 16 Mee. & W. 817; Reg. *v.* Cox, 14 Q. B. D. 153.

(*p*) Beatson *v.* Skene, 5 H. & N. 832.

(*q*) Hardy's case, 44 St. Tr. 816; Attorney-General *v.* Briant, 15 Mee. & W. 169.

a relevant matter, though of the most delicate nature, and communicated to him or her in the strictest confidence (*r*).

A party producing a witness is not (even though in the opinion of the judge he shall prove to be adverse) allowed to impeach his credit by general evidence of bad character; but he may, in such case, contradict him by other evidence; or, by leave of the judge, he may prove that he has made, at some other time, a statement inconsistent with his present testimony; but to protect the witness, in such a case, against unfair surprise, it is necessary, before such proof be given, that the circumstances of the supposed former statement, so far as is sufficient to designate the particular occasion, should be mentioned to him; and only then may he be asked whether or not he has made such statement (*s*).

One witness, if credible, is *sufficient* evidence of any single fact; though undoubtedly the concurrence of two or more corroborates the proof (*t*); and our law considers that there are many transactions to which only one person is privy, and therefore does not, as a rule, demand the testimony of two, as the civil law universally required,—"*Unius responsio testis omnino non audiatur*" (*u*).

After the examination of the witness by the party for whom he is called, which is termed his *examination in chief*,

(*r*) Wilson *v.* Rastall, 4 T. R. 753; Valliant *v.* Dodemead, 2 Atk. 524.

(*s*) 17 & 18 Vict. c. 125, s. 22; Greenhough *v.* Eccles, 5 C. B. (N. S.) 786.

(*t*) Hill *v.* Wilson, L. R., 8 Ch. App. 888; Shillito *v.* Hobson, 30 Ch. D. 396.

(*u*) Cod. 4, 20, 9. Blackstone (vol. iii. p. 370) remarks upon this rule as followed by modern civilians:—"As they do not allow a "less number than two witnesses "to be *plena probatio*, they call the "testimony of one, though never "so clear and positive, *semiplena* "*probatio* only, on which no sen- "tence can be founded. To make "up therefore the necessary com- "plement of witnesses, when they "have one only to a single fact, "they admit the party himself "(plaintiff or defendant) to be ex- "amined in his own behalf, and "administer to him what is called "the *suppletory* oath,—and if his "evidence happens to be in his "own favour, this immediately "converts the half proof into a "whole one."

he is subject to *cross-examination* by the opposite party,—which being concluded, he may then be *re-examined* by the party calling him, with reference to any matter arising out of the cross-examination (*x*). The object of the cross-examination, it should be observed, may not only be to obtain new facts not before elicited, but to impeach the credit of the witness. He may therefore be asked, if he has not given a contrary account of the same matter on a former occasion; and if he does not distinctly admit this, proof may then be given, *aliunde*, that he has done so (*y*). But the law, in this case, also, makes the same provision for his protection, as in the case where he is interrogated as to former statements by the party producing him; and further requires, that, if it is intended to contradict him by his former statement in *writing*, his attention must, before the contradictory proof be given, be called to those parts of the writing which are to be used for the purpose of contradiction (*z*). Evidence may also be offered to prove, that he has been convicted of perjury or the like; or, generally, that he is of such a character as not to deserve to be believed upon his oath; but no evidence can be given against him of particular acts of misconduct, for this would be to engraft another trial upon that which is already before the jury,—not only perplexing the administration of justice, but putting the witness himself to the unfair disadvantage of being assailed on charges of which he has had no previous notice (*a*). He may, however, be questioned as to whether he has been convicted of any felony or misdemeanor; and if he denies the fact or refuses to answer, the conviction may be proved (*b*); and that is usually done by producing a certificate of the conviction duly signed. Moreover, the credit of a witness

(*x*) Prince *v.* Samo, 7 A. & E. 627.

(*y*) 17 & 18 Vict. c. 125, s. 23.

(*z*) Sect. 24; 28 & 29 Vict. c. 18, ss. 4, 5.

(*a*) Queen's case, 2 Brod. & Bing. 299; Carpenter *v.* Wall, 11 A. & E. 803.

(*b*) 17 & 18 Vict. c. 125, s. 25.

may be impeached, not only by means of cross-examination, by proving previous contradictory statements, and by evidence reflecting on his character for veracity; but also by *rebutting* his evidence, by calling witnesses to disprove such of the facts stated by him, whether in his direct or cross-examination, as are material to the issue (*d*).

No evidence is necessary as to any matters of which the court will take judicial notice; as, for instance, of the existence of a war in which this country is engaged, and which has been publicly proclaimed, or recognized in Acts of Parliament (*e*). Nor is any evidence needed as to matters which the law presumes,—as that a man is innocent till the contrary be shown,—that all official acts have been done in due form,—or that a child born to a woman during her marriage with her husband is legitimate (*f*). Nor is evidence in general necessary, with respect to matters which the opposite party has at any time admitted to be true (*g*); or which are admitted on the pleadings (*h*); and evidence is, of course, always dispensed with, as to matters upon which an admission has been made for the express purpose of being used at the trial. And with reference to this latter subject, the Judicature Acts provide, that either party may give notice that he admits the truth of the whole or any part of the case of the opposite party (*i*); or may call on the other party to admit any document, saving all just exceptions, and in case of refusal or neglect to admit, the costs of proving the document are to be paid by the party so called upon, whatever may be the result of the action,—unless, indeed, the court certifies that the refusal to admit was reasonable; and, on the other hand, no costs

(*d*) Taylor on Evidence, s. 1329.

(*e*) 8 & 9 Vict. c. 113; 14 & 15 Vict. c. 99, ss. 7—14; c. 100, s. 22.

(*f*) 1 Bl. Com. 457; Goodright *v.* Saul, 4 T. R. 251, 356; Saye and Sele Peerage, 1 H. of L. Cases, 509; Hargrave *v.* Hargrave, 9 Beav. 552.

(*g*) See Rex *v.* Gardner, 2 Camp. 513; Rex *v.* Topham, 4 T. R. 126; Brickett *v.* Hulse, 7 Ad. & E. 454.

(*h*) Smith *v.* Martin, 9 Mee. & W. 304; Harris *v.* Gamble, 7 Ch. D. 877.

(*i*) Ord. xxxii. r. 1.

of proving any document will, in general, be allowed to a party who neglects to give the usual notice to admit (*k*). And the same Acts further provide, that either party may call on the other to admit (for the purposes of the trial only) any specified *facts*, with or without qualifications; and, in case of his refusal or neglect to make the admission, he will in general have to bear the costs of proving the facts which he has refused to admit (*l*). Moreover, either party may give a written notice to the other party, in whose pleadings or affidavits reference is made to any document, to produce the same for his inspection and perusal, and to permit a copy to be taken, on pain of not being allowed at the trial to put such document in evidence, —unless the party to whom such notice was given shall satisfy the court that the document relates only to his own title (he being defendant), or that it was not produced for some other sufficient reason (*m*); and either party may apply for an order for the production of any document in the possession or power of the other party relating to any matter in question in the action,—such document to be dealt with by the court when produced as shall appear just (*n*).

It is a fundamental rule of the law of evidence, that no evidence is admissible except upon the point in issue (*o*); *e.g.*, in an action of debt, where the defendant denies his bond, and alleges that it is not his deed, and the issue is whether it be his deed or no,—he cannot give in evidence a release of this bond; for that does not destroy the bond, but shows only that it is discharged; and therefore does not support his side of the issue, which is the allegation that the bond alleged against him is not his deed; and he should have pleaded the release, in order to have made such evidence admissible.

(*k*) Ord. xxxii. r. 2.
(*l*) Ibid. r. 4.
(*m*) Ord. xxxi. r. 15; Quilter *v.* Heatley, 23 Ch. Div. 42.
(*n*) Ord. xxxi. r. 14.
(*o*) B. N. P. 298; Hey *v.* Moorhouse, 6 Bing. N. C. 52.

Another general rule is, that none but the best evidence shall be adduced (*p*); by which we are to understand, that that which is of a secondary, shall not be substituted for that which is of a primary kind, where the primary evidence is accessible,—a rule founded on the presumption that such a substitution is probably prompted by some sinister motive. Thus, the contents of no *private* deed or writing,—as distinguished from a record or other public document (*q*),—can be proved by a copy (still less by mere oral evidence), if the writing be in existence, and can be procured by the party by whom the proof is offered,—but (if the objection be taken at the trial) the writing itself must be produced (*r*). And if there be occasion to prove its execution by a witness,—a proof that the law in general requires, unless it be thirty years old, and come out of the possession of some person naturally entitled to the custody (*s*),—this, as the law until recently stood, could only be done by calling the particular person (if any) whose name was thereon written as attesting the execution (*t*); or by calling one such person at least, if there were several; or else by proving that such attesting witnesses were all dead, or otherwise incapable of giving their testimony (*u*), and then adducing secondary evidence of the execution, as by proof of the handwriting of their signatures (*x*); and so strict was this rule in its nature, that even the admission of the party against whom the instrument was produced, that it was executed by him, (unless such admission were made for the express purpose of the trial,) would not have sufficed to excuse the absence of the attesting witness (*y*);

(*p*) 3 Bl. Com. 368; Taylor on Evidence, pp. 340—368, 2nd edit.

(*q*) 14 & 15 Vict. c. 99, s. 7.

(*r*) M'Gahey *v.* Alston, 2 Mee. & W. 206; Jones *v.* Tarleton, 9 Mee. & W. 675; Howard *v.* Smith, 3 Man. & Gr. 254; Queen *v.* Llanfaethly, 2 Ell. & Bl. 940.

(*s*) B. N. P. 255; 2 Phill. on Ev. 203; Doe *d.* Neale *v.* Samples, 8 A. & E. 151.

(*t*) Gillott *v.* Abbott, 7 A. & E. 783.

(*u*) Adams *v.* Kerr, 1 B. & P. 360.

(*x*) Nelson *v.* Whittall, 1 B. & Ald. 19.

(*y*) R. *v.* Harringworth, 4 M. & S. 354.

but the law in this respect has undergone an important change; for by 17 & 18 Vict. c. 125, s. 26, it is now unnecessary to prove, by the *attesting witness*, any instrument to the validity of which attestation is not required by law; and such instrument may now, therefore, be proved by admission or otherwise, as if there had been no attesting witness thereto. Also, by the express provisions of particular statutes (*e.g.*, the Bankers' Books Evidence Act, 1879), certified extracts of certain *private* documents are made admissible in evidence; and as regards documents of a *public* character, they may be proved by the Queen's printer's copies thereof (*z*); and even by copies purporting to be printed under the superintendence of Her Majesty's Stationery Office (*a*).

On the other hand, it is held that there are no degrees of secondary evidence; but that where the circumstances are such as to excuse a party from giving the primary proof, he is at liberty to resort to any species of secondary evidence within his power (*b*); *e.g.*, where the defendant is let into secondary evidence of the contents of a letter,—by his showing that the letter itself is in the possession of the plaintiff, who has had notice to produce it in court, and fails to do so (*c*),—he is then at liberty to give *oral* evidence of its contents; and he is not bound to produce a *copy*, though in fact he should have kept one (*d*).

Another cardinal rule in the law of evidence is, that *hearsay*, that is, a statement by a witness of what has been said or declared out of court, by a person not a party to the suit, is not admissible as evidence; for our law deems it unsafe to rely upon the assertions of any one, unless he be called as a witness in the cause, and deliver his testimony under the sanction of an oath, and under the check which

(*z*) Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37).

(*a*) Documentary Evidence Act, 1882 (45 & 46 Vict. c. 9).

(*b*) Doe *v.* Ross, 7 Mee. & W. 192.

(*c*) 15 & 16 Vict. c. 76, s. 119; Ord. xxxii. r. 8.

(*d*) Brown *v.* Woodman, 6 Car. & P. 206, per Parke.

the power of cross-examination imposes (*e*); and this rule is so absolute, that the death of the person by whom the fact was so asserted out of court, and the consequent impossibility of producing him as a witness, makes no difference. And upon the same principle, no written entry or memorandum, made by a person not a party to the suit, can in general be admitted as evidence, even after his death, as between the plaintiff and defendant; for this falls under the same consideration, and is in effect not distinguishable from mere hearsay.

Hearsay is, however, admissible evidence in particular cases. For, first, the declaration of a third person is, in certain instances, admitted as forming part of the *res gestæ;* or, else, as deriving particular credibility from the circumstances under which it was made: *e.g.*, if a question arises, whether a third person committed an act of bankruptcy by absenting himself from his house, his own declaration made at the time, that he so absented himself to avoid a creditor, is good evidence (*f*). So the books of stewards, or other receivers, though strangers to the suit, are admitted in evidence after their death, so far as the entries therein tend to charge them with the receipt of money; because such acknowledgments, having been made against their own interest, are entitled on that ground to particular weight (*g*). Again, declarations or statements in the nature of hearsay are admitted, where evidence of that description happens to constitute the natural and appropriate means of proof; as upon questions of pedigree, or of custom, public boundary, and the like (*h*). To which we may add, as another exception from the general rule, that a statement made by a third person will be receivable

(*e*) Wright *v.* Doe, 7 A. & E. 384; Stobart *v.* Dryden, 1 Mee. & W. 615.

(*f*) 1 Stark. Ev. 48.

(*g*) Higham *v.* Ridgeway, 10 East, 109; Fursdon *v.* Clogg, 10 Mee. & W. 574; Taylor *v.* Witham, 3 Ch. D. 605.

(*h*) Davies *v.* Lowndes, 5 Bing. N. C. 161; Glenister *v.* Harding, 29 Ch. Div. 985; Haines *v.* Guthrie, 13 Q. B. D. 818.

as evidence against the plaintiff or defendant in the cause, if the plaintiff or defendant be proved to have been present when the statement was made, and to have heard its import; for it then becomes material to consider whether, by his language or demeanour on the occasion, it appeared to receive his assent (*i*).

Lastly, we may notice as a further rule, so far as written instruments are concerned, (and one of recent introduction,) that where the genuineness of a writing is in dispute, evidence on that point may be given by witnesses speaking on *comparison* of such writing with any other writing which has been proved to the satisfaction of the judge to be genuine (*k*).

Having said thus much on the *admissibility* of evidence, we are now to consider its *effect* or *weight;* and here we shall remark, that the evidence may be either *positive* or *circumstantial;* by the former of which we commonly understand a proof of the very fact in question, and by the latter a proof of circumstances from which, according to the ordinary course of human affairs, the existence of the fact may reasonably be *presumed.* And the strength of circumstantial or presumptive evidence varies according to the nature and particular combination of the facts proved; and may either be barely sufficient to decide the question, supposing no evidence to be offered to the contrary; or may be strong enough to prevail against evidence offered on the other side, or even so violent as not to admit of being repelled by any contrary evidence whatever, except under very particular circumstances,—the presumptions here referred to being presumptions of *fact*, as distinguished from the presumptions of *law* which we before referred to as requiring no proof; but some presumptions of fact are in the nature of presumptions of law, there being certain rules of law accepted regarding them (*l*).

(*i*) 1 Stark. Ev. 50.

(*k*) 17 & 18 Vict. c. 125, s. 27.

(*l*) *E. g.* the *presumption of life* (Nepean *v.* Knight, 2 Mee. & W. 894; In re Benham's Trust, Law Rep., 4 Eq. Ca. 416; Rhodes *v.*

Such are the general principles of law relative to the evidence; which evidence, in trials by jury, is required to be given *vivâ voce* in open court, in the presence of the judge and jury, as also of the parties, their solicitors, the counsel, and all bystanders (*m*); each party having liberty to except to its competency; which exceptions are publicly stated, and by the judge are openly and publicly allowed, or disallowed, in the face of the country. Which must curb any secret bias or partiality that might arise in the breast of the judge; and if the judge, either in his directions or decisions, by ignorance, inadvertence, or design, mistakes the law, the counsel on either side was formerly allowed to require him publicly to seal *a bill of exceptions*, wherein was stated the point in which he was supposed to err; and this he was obliged to do, by the Statute of Westminster the second, 13 Edward I. c. 31 (*n*). At the time when this practice prevailed, the bill of exceptions was examined in the appellate court of Exchequer Chamber (*o*),—the jurisdiction and powers of which court have been transferred by the Judicature Acts to the Court of Appeal thereby established; and the bill of exceptions itself has in consequence been also abolished, in order to give uniformity to the manner of raising an appeal (*p*); but the right of the

Rhodes, 35 Ch. Div. 586); of *seisin in fee* (Jayne *v.* Price, 5 Taunt. 326; Doe *v.* Williams, 2 Mee. & W. 749); of *death without issue* (Doe *v.* Woolley, 8 B. & C. 22; Earl of Roscommon's case, 6 Clark & Fin. 97); of *a reconveyance* (Fenney *v.* Jones, 3 M. & Scott, 472; Doe *v.* Williams, 1 Mee. & W. 749); of *unity of possession* (Clayton *v.* Corby, 2 Gale & D. 174); of *authority as agent* (Owen *v.* Barrow, 1 N. R. 101; Ward *v.* Evans, Salk. 442); of *payment* (Welch *v.* Seaborn, 1 Stark. Rep. 474; Oswald *v.* Legh, 1 T. R. 270; R. *v.* Stephens, 1 Burr. 434; Egg *v.* Barnett, 3 Esp. 196); and of *due stamping* (Doe *v.* Coombs, 3 Q. B. 687).

(*m*) 3 Bl. Com. p. 372; 38 & 39 Vict. c. 77, s. 20.

(*n*) Bl. Com., ubi sup.

(*o*) The sufficiency in law of the facts proved at the trial to maintain the issues, might also formerly have been raised by a *demurrer to the evidence;* but that practice has been long discarded, in favour of an application for a new trial.

(*p*) Ord. xxxix. rr. 3, 6; Ord. lii. r. 2.

parties to have the issues for trial properly submitted to the jury, with a full direction upon the law thereon, together with the power of enforcing such right in the Court of Appeal, upon an "exception" entered upon and annexed to the record, has been expressly preserved (*q*).

This open examination of witnesses *vivâ voce*, in the presence of the jury, is much more conducive to the clearing up of truth, than evidence taken down elsewhere in writing from the mouths of the witnesses, and afterwards read in court; for a witness will often depose that in private which he would not venture to allege before a public and solemn tribunal. [In evidence taken out of court, moreover, an artful or careless scribe may make a witness speak what he never meant, by dressing up the depositions in his own form and language; but the witness in open court is at liberty to correct and explain his meaning, if misunderstood,—which he cannot so surely do after his written deposition is once taken. Besides all this, the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled; and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial. Nor is the presence of the judge, during the examination, a matter of small importance: for, besides the respect and awe with which his presence will naturally inspire the witness, he is able, by use and experience, to keep the evidence from wandering from the point in issue; and, in short, it is by this public and oral method of examination only, that persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behaviour, and inclinations of the witness (*r*).]

(*q*) 38 & 39 Vict. c. 77, s. 22; 39 & 40 Vict. c. 59, s. 17; Cheese *v.* Lovejoy, 2 P. D. 161.

(*r*) Blackstone (vol. iii. p. 374)

When the evidence is completed on both sides, the judge, in the presence of the parties, the counsel, and all others, sums up the whole to the jury; recapitulating in greater or less detail, as he may deem necessary, the statements of the witnesses, and the contents of the documents adduced on either side: commenting upon the manner in which they severally bear upon the issue, and giving his direction upon any matter of law that may arise upon them: but leaving the jury to determine for themselves the credit and weight to which they are respectively entitled, and to decide whether, upon the whole, the preponderance of proof is in favour of the plaintiff or the defendant (*s*).

The jury, after the proofs are summed up, if they express a wish so to do, withdraw from the court to consider their verdict (*t*); and are kept till they are all agreed (*u*); [and if they eat or drink at all, or have any eatables about them, without the consent of the court, and before verdict, it is fineable; and if they do so at his charge for whom they afterwards find, it will set aside the verdict (*x*);

remarks, that "very good instructions for examining and cross-examining witnesses" are laid down by Quintilian (Instit. Orat. l. 5, c. 7).

(*s*) As to the duty of a judge, with reference to leaving a case to the jury, or withdrawing it from their decision, see Metropolitan Railway Company *v.* Jackson, 3 App. Ca. 193; and Dublin Wicklow and Wexford Railway Company *v.* Slattery, ib. 1155.

(*t*) 3 Bl. Com. p. 375. Blackstone adds that, "in order to avoid "intemperance and causeless de- "lay, they are to be kept without "meat, drink, fire, or candle, unless "by permission of the judge;" but the Juries Act, 1870, provides, that jurors, after having been sworn, may, at the discretion of the judge, be allowed the use of a fire when out of court, and reasonable refreshment to be procured at their own expense. (33 & 34 Vict. c. 77, s. 23.)

(*u*) The necessity for an absolute unanimity is peculiar to our law (3 Black. 376); for even in the *nembda*, or jury of the antient Goths (Stiern. l. i. c. 4), there was required, even in criminal cases, only the consent of the major part; and in case of an equality, the defendant was held to be acquitted.

(*x*) Hughes *v.* Budd, 8 Dowl. P. C. 315; Morris *v.* Vivian, 10 Mee. & W. 137.

[and if they speak with either of the parties or their agents after they have gone from the bar, or receive any fresh evidence in private; or if, to prevent disputes, they cast lots for whom they shall find,—any of these circumstances will vitiate the verdict. And it is laid down in the books, that if the jurors do not agree in their verdict before the judges are about to leave the town, though they are not to be threatened or imprisoned (*y*), yet the judges are not bound to wait for them, but may carry them round the circuit, from town to town, in a cart (*z*).] In our own days, if the jury are unable to agree upon their verdict, a juror is often *withdrawn*, by consent of the parties, so that no verdict can be given (*a*); or the whole jury may (with or without such consent) be *discharged* by the judge, after having retired for a considerable time for deliberation (*b*).

[When they are all agreed, the jury return back to the bar; and before they deliver their verdict, the plaintiff is bound to appear in court] by himself, or by his solicitor, or counsel; which rule appears to have had its origin in this, namely, that the plaintiff was required to be present, to answer the "amercement" to which, by the old law, he was, in case of failure, liable as a punishment for his false claim (*c*),—*amercement* signifying that he was *à mercie*, at the mercy of the crown with regard to the fine to be imposed,—*in misericordiâ domini regis, pro falso clamore suo.* And although this amercement is now disused, yet an allusion to it may still be traced; for if the plaintiff does not appear, the plaintiff is said to be *nonsuit*,—*non sequiter clamorem suum.* Therefore, it was usual for a plaintiff, when he or his counsel perceived that he had not given evidence sufficient to main-

(*y*) Mirrour, c. 4, s. 24.

(*z*) 3 Bl. Com. p. 376, citing Lib. Ass. fol. 40, p. 11; 1 B. & S. 429; Law Rep., 1 Q. B. 305.

(*a*) Stodhart *v.* Johnson, 3 T. R. 657; Harries *v.* Thomas, 2 Mee. & W. 38. If a juror be withdrawn by consent, and the action be afterwards proceeded with, or a fresh action brought, the defendant may apply to stay proceedings. (Gibbs *v.* Ralph, 15 L. J. (Ex.) 7.)

(*b*) The Queen *v.* Charlesworth, 1 B. & Smith, 460.

(*c*) Finch, L. 189, 252.

tain the issue, to be voluntarily nonsuited or to withdraw himself; whereupon the crier was ordered to *call the plaintiff;* and if neither he nor anybody for him appeared, the jurors were discharged; and the defendant might apply for judgment of *nonsuit* to be entered in the action, which entitled him to his costs. This practice arose, because, after a nonsuit which was only a default, the plaintiff used to be allowed to commence the same action again, for the same cause of action; which he could not have done after an adverse *verdict.* But on the first commencement of the Judicature Acts, any judgment of nonsuit had, in general, the same effect, in this respect, as a judgment for the defendant on the merits, and could only have been set aside for mistake, surprise, or accident (*d*); there is, however, no express provision regarding a nonsuit in the existing Orders and Rules of 1883,—it being only therein provided (*e*), that a plaintiff may, with the leave of the court, discontinue his action either before, or at, or after the trial, upon such terms as the court may think fit; and one of these terms usually is, that the plaintiff shall pay, to the defendant, all his costs of action; and another of such terms may be (but usually is not), that the discontinuance shall be a bar to any future action for the same cause.

But in case the plaintiff appears, the jury, by their foreman, deliver in their verdict; and by the verdict, (*verè dictum,*) they openly declare themselves to have found the issue or issues they have had to try, for the plaintiff, or (as the case may be) for the defendant (*f*); and if for the

(*d*) Ord. xli. (1875), r. 6.

(*e*) Ord. xxvi. r. 1; Poyser *v.* Minors, 7 Q. B. D. 329; Stahlschmidt *v.* Walford, 4 Q. B. D. 217.

(*f*) The verdict is said in the books to be either *privy* or *public*—and it is stated by Blackstone, (vol. iii. p. 377,) that "a *privy* verdict "is when the judge hath left or adjourned the court, and the jury "being agreed, in order to be de- "livered from their confinement, "obtain leave to give their verdict "privily to the judge out of court;" though he adds, that, "if the judge "hath adjourned the court to his "own lodgings, and there receives "the verdict, it is a *public* and not "a privy verdict." He also states, that a *privy* verdict is of no force,

plaintiff, they also, in certain actions, at the same time assess the damages by him sustained in consequence of the injury of which he has made complaint (*g*).

If there should arise at the trial, upon the facts proved, any difficult matter of law, the course has been occasionally taken of finding a *special* verdict,—this proceeding being founded on the statute 13 Edw. I. c. 30, s. 2 (*h*); and in a special verdict, the jury state the naked facts, as they find them to be proved,—concluding conditionally, that if upon the whole matter the court should be of opinion that the issue ought to be found for the plaintiff, then they find for the plaintiff, and assess the damages accordingly; if otherwise, then for the defendant. And another method of finding a special verdict has been, when the jury find a verdict, generally, for the plaintiff, but subject to the opinion of the court on a *special case*, stated by the counsel on both sides, and containing a statement of facts mutually agreed upon.

[When the jury have delivered in their verdict, and it is recorded in court, they are then discharged; and so ends the trial by jury;—a trial which, besides its other advantages, is also as expeditious and cheap as it is con-

unless afterwards affirmed openly in court, and that the jury may then vary from it, if they please; and that it is "a dangerous prac- "tice, allowing time for the parties "to tamper with the jury and "therefore, very seldom indulged "in."

(*g*) By 3 & 4 Will. 4, c. 42, s. 28, the jury may, upon the trial of any issue or inquisition of damages, allow *interest*, at the current rate, upon debts from the time when they were payable, if made payable by a written instrument, and at a time certain; or if payable otherwise, then from the time when demand of payment shall have been made in writing, with notice that interest will be claimed (Mowatt *v.* Lord Londesborough, 4 Ell. & Bl. 1; Duncombe *v.* Brighton Club Company, Law Rep., 10 Q. B. 371); and (by sect. 29) they may give damages *in the nature* of interest, in actions of trover and trespass *de bonis asportatis*, over and above the value of the goods; and also, in actions on policies of assurance, over and above the money insured.

(*h*) Mayor of Devizes *v.* Clark, 3 A. & E. 506.

[venient, equitable, and certain: and indeed trial by jury has ever been looked upon as the glory of the English law;] and although, according to the existing practice of the courts, the great majority of actions, as well in the Queen's Bench Division as in the Chancery Division, are now tried by a judge without a jury, still (as we have seen) either party may insist upon trial with a jury, in that difficult group of actions known as actions for slander, libel, false imprisonment, malicious prosecution, seduction, and breach of promise of marriage (*i*).

2. Trial *before a Judge* (*or Judges*), or *before a Judge sitting with Assessors*.—A trial before a judge of questions of fact as well as of law, dispensing with a jury, was first introduced into the common law courts by the Common Law Procedure Act, 1854; though it has always been (as it still is) the usual practice in the Court of Chancery (or Chancery Division) and in Admiralty. Under that statute, however, issues of fact could only be so disposed of, by the express consent both of the parties and of the court; but under the Judicature Acts, this is one of the modes of trial which may be specified by the party bringing the action on for trial, in his notice of trial,—though the other party may (in a proper case) obtain an order of the court to have the facts tried before a judge and jury (*k*); but a notice of trial, given generally, means now a trial before a judge without a jury.

3. Trial *before an Official or Special Referee, with or without Assessors*.—We have seen, in a former part of this volume, that, among the remedies by act of the parties, that of referring disputes to arbitration is one; and we have now to consider, in this place, how far this or the like mode of settling disputes is available in the course of an action. Firstly, then, it was provided, by the Common

(*i*) Ord. xxxvi. r. 2.

(*k*) Ord. xxxvi. rr. 3, 4, 5, 6; Sugg *v.* Silber, 1 Q. B. D. 362; Swindell *v.* Birmingham Syndicate, 3 Ch. D. 127; Ruston *v.* Tobin, 10 Ch. D. 558; Hunt *v.* Chambers, 20 Ch. D. 365.

Law Procedure Act, 1854 (17 & 18 Vict. c. 125), that, if, at any time after the issuing of the writ of summons in an action, it was made to appear to the court or a judge, that there was no preliminary question as to the defendant's liability, but that the matter in dispute consisted wholly or in part of matters of *mere account* which could not conveniently be tried in the ordinary way,—an order might issue, that such matter should, upon reasonable terms as to costs and otherwise, be compulsorily referred to some arbitrator selected by the parties, or else to a Master or other officer of the Court (*l*). And secondly, by the Judicature Act, 1873, it was provided, by sect. 56, that, subject to the right of the parties to have disputed facts submitted to the verdict of a jury (*m*), any question arising in any cause or matter (other than a criminal proceeding by the crown), before the High Court of Justice or before the Court of Appeal, might be referred, for inquiry and report, to an *official* or special referee (*n*), whose report (if adopted) might be enforced as a judgment (*o*); and, by sects. 57—59, that, with the consent of the parties, and (in certain cases) without such consent, any question or issue of fact, or any question of account arising, might be ordered to be tried before an official or special referee, (with or without

(*l*) 17 & 18 Vict. c. 125, ss. 3, 6; Brown *v.* Emerson, 17 C. B. 361; Chapman *v.* Van Toll, 8 Ell. & Bl. 396; Clow *v.* Harper, 3 Ex. D. 198.

(*m*) Sugg *v.* Silber, 1 Q. B. D. 362; Clow *v.* Harper, ubi sup.

(*n*) The official referees are permanent officers attached to the Supreme Court; and their number, qualification, and tenure of office is determined by the Lord Chancellor, with the concurrence of the presidents of the divisions of the High Court of Justice, or a majority of them (of which majority the Lord Chief Justice of England must be one), and with the sanction of the Treasury; and they perform the duties entrusted to them in such places, whether in London or in the country, as may be directed by order of court (36 & 37 Vict. c. 66, s. 83; Ord. xxxvi. rr. 45—55.)

(*o*) 36 & 37 Vict. c. 66, s. 56; Dunkirk Colliery *v.* Lever, 9 Ch. D. 20; Jones *v.* Wedgewood, 19 Ch. D. 56; Mercier *v.* Popperell, ib. 58; Burrard *v.* Calisher, ib. 644; and Ord. xxxvi. rr. 45—55.

assessors,) whose report should be equivalent to the verdict of a jury (*p*). The subject of these references is now, however, principally regulated by the Arbitration Act, 1889 (52 & 53 Vict. c. 49), which has modified sect. 56, and repealed sects. 57 to 59 of the Judicature Act, 1873, besides repealing the Common Law Procedure Act, 1854, ss. 3—17, and certain other Acts relating to arbitration; and as the matter now stands, under the Judicature Act, 1873, and the Arbitration Act, 1889, the law may be stated as follows, that is to say:—Subject to any right to have particular cases tried by a jury, the court or a judge may refer any question arising in any cause or matter (other than a criminal proceeding by the Crown), for inquiry or report, to any official or special referee; and the report of the official or special referee may be adopted, wholly or partially, by the court or a judge; and if so adopted, it may be enforced as a judgment or order to the same effect (sect. 13). Also, in any cause or matter (other than a criminal proceeding by the Crown), if all the parties interested (who are not under disability) consent, or if the cause or matter requires any prolonged examination of documents, or any scientific or local investigation which cannot (in the opinion of the court or a judge) conveniently be made before a jury or conducted by the court through its other ordinary officers; or if the question in dispute consists, wholly or in part, of matters of account, the court or a judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator respectively agreed on by the parties, or before an official referee or officer of the court (sect. 14). And upon any such reference, the official or special referee is to be deemed an officer of the court (sect. 15); and subject to the terms of the order of reference, he holds the inquiry or trial at any place which he deems expedient; and he may have any

(*p*) 36 & 37 Vict. c. 66, ss. 57—59; Rowcliffe *v.* Leigh, 3 Ch. D. 292; Leigh *v.* Brooks, 5 Ch. D. 592.

inspection or view, either by himself or with his assessors (if any), which he may deem expedient for the better disposal of the controversy before him; and, unless otherwise directed, he proceeds with the inquiry or trial *de die in diem*, in a similar manner as in actions tried by a jury before a judge of the High Court; but his tribunal is not a public court of justice (*q*). And before the conclusion of any trial before him, or by his report, the referee may submit any question arising therein, or may state any facts specially,—for the decision of the court (*r*); and the court has power to require any explanation or reasons from the referee, and to remit the matter referred, or any part thereof, for re-trial or further consideration, to the same or any other referee: or the court may decide the question itself, either on the evidence already taken before the referee or otherwise (*s*); and generally, the court or a judge has and may exercise, as regards these references, all the powers which are, by the Arbitration Act, 1889, conferred on the court or a judge as to voluntary arbitrations out of court.

IV. The issues in the action having been decided in one or other of the several modes of trial above described, and it having been now ascertained whether the plaintiff is entitled to maintain his action, or the defendant, on the other hand, to be discharged therefrom, the next step is the *judgment*, that is, the formal award of redress in the

(*q*) Ord. xxxvi. r. 48.

(*r*) The referee had originally no power to order judgment to be entered up (Longman *v.* East, 3 C. P. D. 142); and although, under the Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 9, and Ord. xxxvi. r. 50, the terms of the reference to the official referee might have been such as that he should try the whole action,—in which case, he might have directed judgment to be entered, and might have exercised the same discretion as to costs as the court or judge could have exercised, — the Arbitration Act, 1889 (52 & 53 Vict. c. 49), has now, *semble*, repealed all these provisions, so that the powers of the official referee are now limited to those mentioned in the text.

(*s*) Ord. xxxvi. rr. 52—55; Dunkirk Colliery *v.* Lever, 9 Ch. D. 20.

one case, or of discharge in the other. Now, no judgment can be entered after the verdict has been given without an order of the judge (*t*); but if, on application at the trial, the judge orders judgment to be entered for any party absolutely, the judgment is afterwards entered by the proper officer of the court, on the production of the *associate's certificate* to that effect,—such certificate now forming the substitute for what was formerly known as the *postea*. But the judge, after verdict given, may adjourn the question, as to entering judgment, *for further consideration;* or may leave any party *to move for judgment;* and each of these two alternative courses requires some further explanation.

The judge, it is to be remembered, has not only to preside at the trial of the issues of fact, but has himself to determine, sitting as a court of the High Court of Justice, all questions of law which emerge out of the trial; and in cases of difficulty, therefore, his course is to take time "for further consideration" before he directs what judgment shall be entered; and, if necessary, he hears arguments on the matter, at some subsequent sittings of the High Court. This practice of adjourning a judgment for "further consideration" had been long in use in the Court of Chancery; but was not introduced into the common law divisions of the High Court, until after the 39 & 40 Vict. c. 59, s. 17, had enacted, not only that, as the general rule, proceedings in an action were to take place before a single judge, but also that the proceedings therein subsequent to the trial should, where practicable, take place before that judge before whom the trial took place; and since that Act, further consideration is now very generally reserved (in a proper case) in the Queen's Bench Division also.

But instead of determining at the trial, or on further consideration, how judgment shall be entered,—the judge may, at the trial, leave the matter at large, for either party *to move for judgment;* and it has been provided (*u*), that

(*t*) Ord. xl. r. 1. (*u*) Ibid. r. 2.

the plaintiff may, in that state of circumstances, move for judgment; and, in case of his default for ten days after the trial, the defendant may move for judgment. And it has been further provided (*x*), that where, at or after a trial with a jury, the judge has directed any judgment to be entered, either party may apply to set aside such judgment, and enter any other judgment, on the ground that the judgment directed to be entered is wrong, by reason that the finding of the jury upon the facts has not been properly entered; and that where, at or after a trial with or without a jury, the judge has directed any judgment to be entered, either party may apply to set aside such judgment, and to enter any other judgment, on the ground that, upon the finding as entered, the judgment so directed is wrong: and in either case, the application is to be made to the Court of Appeal (*y*); but where (in the case of a jury trial) the application was accompanied with a motion for a new trial, the application was to be made to the Divisional Court (*z*); however, all applications for a new trial also are now made to the Court of Appeal direct (*a*).

With regard to the motion for judgment or motion that the judgment be set aside and another entered, it is to be observed, that, in support of his motion, the party who moves may urge any ground which goes to show that he is entitled to the judgment he claims, by reason of the opposite party having either no cause of action in respect of which the court can give relief, or (as the case may be) no sufficient defence; and the court may, on any such motion, direct judgment to be entered accordingly, without regard to the findings of the jury (*b*).

(*x*) Ord. xl. rr. 3, 4.

(*y*) Ibid. r. 5.

(*z*) Ibid.

(*a*) 53 & 54 Vict. c. 44.

(*b*) Formerly, such ground was urged in what was called a *motion in arrest of judgment;* or for *judgment non obstante veredicto:*—the first being made by an unsuccessful defendant, the latter by an unsuccessful plaintiff; but both motions are now out of use; as is also a motion, of the same general character, termed a *motion for a*

But, again, either party may be dissatisfied with the result of the trial itself, contending that the jury have come to a wrong conclusion on the facts in evidence; or else that they were not properly directed by the judge as to the law of the case; or that he wrongly directed a verdict or a nonsuit (*c*); and in any such case, the proper course is to apply for a new trial,—which application used to be made to a *Divisional Court* sitting for the transaction of the business in the Division wherein the action was pending (*d*), but it is now made to the Court of Appeal direct (*e*).

[The ground of the application, for a new trial, may be an irregularity in the proceedings connected with the trial,—such as want of notice of trial; or any other matter *dehors* (that is, extrinsic to,) the record, tending to show, that though the trial may have been in due form, yet it has not done justice between the parties,—as, for example, any flagrant misbehaviour of the successful party towards the jury, which may have influenced their verdict; or any gross misbehaviour of the jury among themselves; or that the jury have brought in a verdict without, or contrary to, evidence; or that they have given exorbitant or insufficient damages; or that the judge himself has misdirected the jury, so that they have found an unjustifiable verdict. For any of these reasons, or for any of a similar kind, it is competent to the unsuccessful party, whether plaintiff or

repleader, in respect of the issues raised in the pleadings being not to the point, which motion might have been made by either party.

(*c*) Yetts *v.* Foster, 3 C. P. D. 437; Etty *v.* Wilson, 3 Ex. D. 309; Solomon *v.* Bitton, 8 Q. B. D. 176; Phillips *v.* L. & S. W. Rail. Co., 5 Q. B. D. 78.

(*d*) Formerly, in place of an application for a new trial, if the judge gave leave by *reserving* a point of law raised before him, the rule moved for was to the effect, that the party moving might enter the proper judgment, as "to enter a nonsuit," or "to set aside a nonsuit and enter a verdict," without going a second time before a jury; but the existing practice allows all necessary directions, in order to do justice, to be given by the Court on an application for a new trial; and no points are accordingly now reserved (*eo nomine*) at the trial.

(*e*) 53 & 54 Vict. c. 44.

[defendant, to move for a new trial: and if a fresh trial (on the hearing of the motion) be ordered by the court, then a trial of the same issue, (by a new jury duly summoned and impanelled as in other cases,) is instituted *de novo* (*f*).

The power of the court to set aside the verdict and grant a new trial, on account of misbehaviour in the jurors, is of a date extremely antient. There are instances in the Year Books of the reigns of Edward the third (*g*), Henry the fourth (*h*), and Henry the seventh (*i*),—of a judgment being stayed (even after a trial at bar), and a new trial awarded, because the jury had eaten and drunk without consent of the judge, and because the plaintiff had privately given a paper to a juryman before he was sworn. And upon these, the chief justice, Glynn, in 1655, grounded the first precedent that is reported in our books, for granting a new trial, upon account of *excessive damages* given by the jury,—apprehending with reason, that notorious partiality in the jurors was a principal species of misbehaviour (*k*).

At that period, however, it was clearly held for law, that whatever matter was of force to avoid a verdict ought to be returned upon the roll of the proceedings, and not merely surmised by the court,—lest posterity should wonder why a new trial was awarded, without any sufficient reason appearing upon the record (*l*). But very early in the reign of Charles the second, new trials were granted upon *affidavits* (*m*); and the former strictness of the courts of law, in respect of new trials, having driven many parties into courts of equity, to be relieved from oppressive

(*f*) If the fresh trial was ordered in consequence of a mis-trial apparent on the record, the award used to be called a *venire de novo*. (Wood *v.* Bell, 6 Ell. & Bl. 355, 363.)

(*g*) 24 Edw. 3, 24; Bro. Ab. tit. Verdite, 17.

(*h*) 11 Hen. 4, 18; Bro. Ab. tit. Enquest, 75.

(*i*) 14 Hen. 7, 1; Bro. Ab. tit. Verdite, 18.

(*k*) Style, 466.

(*l*) Graves *v.* Short, Cro. Eliz. 616; Palm. 325; 1 Brownl. 207.

(*m*) R. *v.* Lord Fitz-Water, 1 Sid. 235; Goodman *v.* Cotherington, 2 Lev. 140.

[verdicts, the courts of law grew more liberal in granting them; and at length the present maxim was adopted, that in all cases of moment, where justice is not done upon one trial, the injured party is entitled to another (*n*). If every verdict was final in the first instance, it might happen, that, through some surprise in the evidence adduced, or through some momentary legal doubt, or through some mistake or misdirection on the part of the judge that was excusable amidst the hurry of the trial, the verdict of the jury (given *instanter*, before they separated, ate, or drank) might be such as they themselves, upon cool deliberation, would wish to reverse; and granting a new trial, under proper regulations, cures all these inconveniences; and at the same time preserves entire, and renders perfect, that most excellent method of decision which is the glory of the English law. A new trial is a rehearing of the cause before another jury, but with as little prejudice to either party as if it had never been heard before,—no advantage being taken of the former verdict on the one side, or of the rule of court awarding such second trial on the other; and the subsequent verdict, though contrary to the first, imports no blame upon the former jury,—who, had they possessed the same lights and advantages, would probably have altered their own opinion. A sufficient ground, however, must be laid before the court, to satisfy them that it is necessary to justice that the cause should be further considered; and if the matter be such as did not, or could not, appear to the judge who presided at the trial, it is disclosed to the court by affidavit; if it arises from what then passed, it is taken from the judge's information, who usually makes a special and minute note of the evidence; and counsel are heard on both sides, to impeach or establish the verdict; and the court give their reasons at large, why a new trial ought or ought not to be allowed.

The courts do not, however, lend too easy an ear to every

(*n*) Bright *v.* Eynon, 1 Burr. 395.

[application for the review of a former verdict; and require to be satisfied, that there are strong probable grounds to suppose that the merits have not been fairly and fully discussed, and that the decision is not agreeable to the justice and truth of the case; and a new trial is not granted, where the matter is too inconsiderable to merit a second examination; nor is it granted upon nice and formal objections, which do not go to the real merits; nor in cases of strict right or *summum jus*, where its enforcement is not reconcileable with conscience; nor where the scales of evidence hang nearly equal (*o*);] nor, generally, where the jury might reasonably have found as they have found (*p*). Moreover, the Judicature Acts contain an express provision, that a new trial shall not be granted, on the ground of misdirection, or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to them,—unless, in the opinion of the court to which the application is made, some substantial wrong or miscarriage has been thereby occasioned in the trial of the action; and if it appear to such court, that such wrong or miscarriage affects part only of the matter in controversy, or some or one only of the parties, the court may give final judgment as to part thereof, or as to some or one only of the parties, and may direct a new trial as to the other part only, or as to the other party or parties (*q*).

(*o*) Metropolitan Rail. Co. *v.* Wright, 11 App. Ca. 152.

(*p*) In antient times, the principal remedy for reversal of a verdict unduly given was by writ of *attaint;* which was a proceeding for setting aside, by a jury of twenty-four, the verdict of a jury of twelve; the effect of which was, that if the first jury were found to have given a false verdict, they incurred infamy, with imprisonment and forfeiture of their goods; which two latter punishments were, in course of time, commuted into a pecuniary penalty; and this writ of attaint was as old as the reign of Henry the second, and remained in force (though quite fallen out of use) till abolished by the stat. 6 Geo. 4, c. 50, s. 60. (See 3 Bl. Com. pp. 388, 402.)

(*q*) Ord. xxxix. r. 6.

The next step in the regular course of an action, is for the successful party to cause the *judgment to be entered* by the proper officer of the court; and this is done, upon his delivering to such officer the associate's certificate of the judge's directions at the trial, together with a copy of the whole of the pleadings in the action other than any petition or summons (*r*). And immediately after the time when such judgment shall thus have been duly entered, every person to whom, under it, any money or costs shall be payable, may forthwith enforce the same by execution as presently to be mentioned,—unless, indeed, the execution has been stayed for a time by order of the court (*s*).

We have hitherto considered actions that come to issue through the instrumentality of pleadings; but the course of proceedings may be of a more summary kind. For the Common Law Procedure Act, 1852, with a view to avoid (where practicable) the expense and delay attendant upon pleading, provided, that where there was any question *of fact* in dispute between the parties to an action, the decision of which they agreed should settle the controversy, they might, at any time after writ of summons and before judgment, by consent and order of a judge, state such question in the form of an issue without pleadings; and such issue was then entered for trial, and tried accordingly, in the same manner as an issue joined in the ordinary way; or, if agreed on the facts, they might state any question *of law*, in a special case, for the opinion of the court without any pleadings: and in either case might agree, that, upon the finding of the jury on such issue, or upon the opinion of the court being given on such question, judgment might be entered for any specified sum of money to be paid by one of the parties to the other (*t*). And

(*r*) Ord. xli. rr. 1, 4.

(*s*) Formerly, execution could not issue after the verdict of a jury, until the expiration of fourteen days,—unless an order was obtained for execution forthwith, or at an earlier period than fourteen days.

(*t*) 15 & 16 Vict. c. 76, ss. 42—48; Bishop *v.* Elliott, 11 Exch. 113.

the Judicature Acts, also, contain a provision, that the parties may, after the writ of summons has issued, concur in stating the question of law arising in the action, in the form of a special case, for the opinion of the court; and questions of law may also be directed, by the court itself, to be raised for its opinion, by way of special case or otherwise (*u*).

Again, it may happen that one of the parties becomes entitled to judgment after the pleadings have begun, but before any issue is attained. For judgment will be awarded in an action, not only where the facts are confessed by the parties, and the question of law or equity is determined by the court, or where the law or equity is admitted by the parties, but the facts are disputed,—but also where both the facts and the law or equity arising thereon are admitted by the defendant. Of this kind is a judgment by confession,—which has been otherwise called judgment on *cognovit actionem* (*x*); also, judgment for default of appearance to the writ of summons (*y*), or for any default of defence made to the plaintiff's statement of claim,—which last used technically to be called judgment by *nihil dicit*, but is now called judgment for default of defence. And, lastly, judgment may be awarded where the plaintiff becomes convinced, from what takes place at the trial, that he cannot support his action, and therefore enters a *nolle prosequi* (*z*), or obtains leave to discontinue his action (*a*).

Judgments are either *interlocutory* or *final*. An *interlocutory* judgment may be one which is given upon some defence, proceeding, or default, which is only intermediate, and does not finally determine or complete the action; but the interlocutory judgments most usually spoken of as such, are those whereby the *right* of the plaintiff is

(*u*) Ord. xxxiv. rr. 1, 2.
(*x*) Arch. Pr. 13th ed. p. 755.
(*y*) Vide sup. p. 540.
(*z*) 3 & 4 Will. 4, c. 42, s. 32; Bowden *v.* Horne, 7 Bing. 716; Fagan *v.* Dawson, 4 Man. & G. 711; Boyle *v.* Webster, 21 L. J. (N. S.) Q. B. 202; Arch. Pr. 13th ed. p. 1201.
(*a*) Ord. xxvi. r. 1.

indeed established, but the *quantum* of damages sustained by him is not ascertained,—a matter which (as the general rule) requires the intervention of a jury. This happens where the defendant suffers judgment to go against him by *confession* or *for default*, in any action brought for detention of goods and pecuniary damages, or either of them, or for breach of promise of marriage. In such a case as this, the plaintiff is entitled to an interlocutory judgment; but because the court know not the value of the goods or what damages the plaintiff hath sustained, he must have the same ascertained either by a writ of inquiry, or in some other way in which a question arising in an action may be tried (*b*). If the damages are to be assessed under a writ of inquiry, the writ is addressed to and executed by the sheriff, who, by his under-sheriff, ascertains, by the verdict of a jury, what damages the plaintiff hath really sustained; and when their verdict is given, the sheriff returns the inquisition into court,—whereupon it is adjudged, that the plaintiff do recover the sum so assessed and his costs. In like manner, when a demurrer was determined for the plaintiff in an action wherein goods or damages were claimed, and there was no defence, the judgment was entered in the same interlocutory form, and was followed by a like writ of inquiry or other method of ascertaining the value or damages (*c*). But in many cases, though the action is brought in point of form for damages, (or *sounds* in damages, according to the technical term,) yet the amount recoverable by the plaintiff is substantially a matter of mere calculation, and one therefore upon which a jury would have no discretion to exercise; and in all such cases—whether the judgment be

(*b*) Ord. xiii. r. 5.

(*c*) It was provided, by 3 & 4 Will. 4, c. 42, s. 18, that judgment after a writ of inquiry might be signed and execution issued forthwith,—unless the sheriff certified, that judgment ought not to be signed until defendant had an opportunity to apply to the court to set aside the execution of the writ; or unless a judge should think fit to stay the judgment.

by confession, default, or otherwise—the course (as laid down by the Common Law Procedure Act, 1852) is not to issue any writ of inquiry, but to apply for an order of the court or a judge, that the amount which the plaintiff is entitled to recover shall be ascertained by one of the Masters of the court (*d*).

A *final* judgment is that which is awarded at the end of the action, however determined. But this distinction is always to be understood, with respect to cases where there has been no verdict, namely, that if the action be for recovery of *damages*, the final judgment is preceded by an interlocutory one such as we have just spoken of; but if the action be for recovery of a *debt* or liquidated sum of money, then the judgment is final in the first instance (*e*). And we may remark here, that final judgments in the first instance, as upon confession or default of pleading, are often agreed upon before an action is brought, and constitute a very usual form of security for money,—the course being for the debtor to execute a *warrant*, a *cognovit actionem*, or a *consent to a judge's order* for judgment,—in favour of some solicitor named by the creditor, empowering the creditor to enter judgment against the debtor in an action for the specific sum due (*f*); but the practice, in this particular, is subject to several restrictive regulations, for the prevention of fraud or oppression (*g*).

(*d*) 15 & 16 Vict. c. 76, s. 94.

(*e*) Ibid. s. 93.

(*f*) 3 Bl. Com. 397.

(*g*) The restrictive regulations referred to in the text are set forth in the Debtors Act, 1869 (32 & 33 Vict. c. 62), ss. 24—28, in substitution for previous provisions on the same subject chiefly contained in 1 & 2 Vict. c. 110, ss. 9, 10, repealed by 32 & 33 Vict. c. 83; and under the existing regulations, no *warrant of attorney or cognovit* shall be of any force, unless there be present some solicitor on behalf of the person giving it, expressly named by him, and attending at his request, to inform him of the nature and effect of the instrument before the same is executed; which solicitor shall subscribe his name as a witness to the due execution, and thereby declare himself to be solicitor for the party, and state that he subscribes as such; and the warrant or cognovit must be filed in court within twenty-one days after it is made,—as must also a

At common law, all judgments had relation to the first day of the term in which they were signed, though in point of fact not signed till afterwards (*h*),—the Term having been considered, for this and some other purposes, as consisting but of one day. But, by the present practice, all judgments, whether interlocutory or final, are entered of record of the day of the month and year when they are actually pronounced; or when the requisite authority or papers are left with the proper officer, to enable him to enter judgment (*i*); and judgments have now no relation to any other day (*k*); but it is competent for the court or a judge to order a judgment to be entered *nunc pro tunc* (*l*). By 1 & 2 Vict. c. 110, s. 7, every judgment debt carries interest, at the rate of 4*l.* per cent. per annum, from the time of entering up the judgment until the same shall be satisfied; and such interest may be levied under a writ of execution on such judgment (*m*).

Thus much for the general law of judgments; but before proceeding to show how they are enforced, it is proper to state, that [to a judgment *costs* are now a necessary appendage—"*victus victori in expensis condemnandus est*,"—though the common law did not allow any (*n*);] so that costs depend entirely upon statute; and there are many

"judge's order,"—otherwise any judgment or execution upon the warrant, cognovit, or judge's order will be void (Gowan *v.* Wright, 18 Q. B. D. 201; In re Smith, Ex parte Brown, 20 Q. B. D. 321).

(*h*) Jeffreson *v.* Morton, 2 Saund. by Wms. 8 k.

(*i*) Ord. xli. rr. 1, 4.

(*k*) Even as early as the time of Charles the second, it was provided, in favour of *bonâ fide* purchasers for valuable consideration, that, as against *them*, judgments should bind the lands of the debtor only from such time as they should be signed, and should not relate to the first day of the term (29 Car. 2, c. 3, ss. 13—15).

(*l*) Miles *v.* Williams, 9 Q. B. 47; Fishmongers' Company *v.* Robertson, 3 C. B. 970; Freeman *v.* Tranah, 12 C. B. 406; Heathcote *v.* Wing, 11 Exch. 355; Moor *v.* Roberts, 3 C. B. (N. S.) 844; and Ord. lii. r. 15.

(*m*) Ord. xlii. r. 16; Newton *v.* Grand Junction Railway Co., 16 Mee. & W. 139.

(*n*) Cod. 3, 1, 13.

cases of vexatious proceedings, in which the legislature at one time provided, that the party in fault should be punished, by the payment to his adversary of *double* or (sometimes) *treble* costs; but by 5 & 6 Vict. c. 97, all such provisions were repealed; and, under that Act, the adversary was to be entitled only to a full and reasonable indemnity, to be taxed by the proper officer. The first statute which directed that costs should be given to a successful plaintiff in an action at law, was the Statute of Gloucester, 6 Edw. I. c. 1 (*o*); prior to which Act, costs were included in, and were recoverable as part of, the damages, in those actions in which damages were given; but because those damages were frequently inadequate to the *plaintiff's* expenses, therefore the Statute of Gloucester ordered costs, *eo nomine*, to be also added. But as the general rule, no costs were allowed to the *defendant* in an action at law, in any shape, till the statutes 23 Hen. VIII. c. 15, 8 Eliz. c. 2, 4 Jac. I. c. 3, 8 & 9 Will. III. c. 11, and 4 & 5 Ann. c. 3; and these gave the defendant, if he prevailed, the same costs as the plaintiff would have had in case he had succeeded. But even after these enactments, there still remained several points in which the law of torts was defective, both as regards the plaintiff and the defendant; and various provisions were from time to time passed, with the object of amending them (*p*); by one of which, it was provided, that if a plaintiff, instead of taking out execution upon a judgment he had recovered, should bring an action thereon, he should have no costs of suit unless the court or a judge should otherwise order (*q*); and it was also (among other matters) laid down, under these enactments, that though the party who succeeded substantially should have the

(*o*) 3 Bl. Com. 399; 42 & 43 Vict. c. 59; Bentley *v.* Dawes, 10 Exch. 347.

(*p*) 9 Ann. c. 25; 1 Will. 4, c. 21; 3 & 4 Will. 4, c. 42, ss. 31—34; 15 & 16 Vict. c. 76, ss. 81, 146, 223; 17 & 18 Vict. c. 125, ss. 42, 44, 57, 67, 93; 23 & 24 Vict. c. 126, ss. 11, 27, 32.

(*q*) 43 Geo. 3, c. 46, s. 4; Adam *v.* Ready, 6 H. & N. 261.

general costs of the action, yet his adversary, where he succeeded on any particular issue, whether in law or fact, should have the costs of the issue on which he was successful (*r*). Moreover, by the County Courts Act, 1867, in order to prevent the practice of suing in the High Court in matters of small amount, it was provided, that if a plaintiff who resorted thereto and recovered a sum not exceeding 20*l.* in an action founded on a contract,—or no more than 10*l.* in an action founded on tort,—he should have no costs of suit, unless the court or a judge should certify on the record that there was sufficient reason for his taking that course (*s*); and these provisions are continued by the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 116,—with this variation, that such costs are now to be allowed by special order; and with this material addition, that if judgment is obtained on a specially indorsed writ (within usually twenty-one days after service of the writ), that judgment shall carry costs. We may further observe, that, in a penal action, no costs were allowed to a plaintiff suing as a common informer, unless they were expressly given by the statute on which he sued; for, as the action itself created the right, he had no claim to damages; and the general rule of law used to be, that where there were no damages, there were no costs (*t*); but this rule appears to have been now so far repealed, that such costs would go with the judgment, unless the judge interposed his discretion (*u*).

With respect, moreover, to pauper suitors,—that is, such as will swear themselves not worth 25*l.* (formerly 5*l.*) in the world, except their wearing apparel and the matter in question in the cause (*x*),—they were, by the statutes 11

(*r*) 15 & 16 Vict. c. 76, s. 81.

(*s*) 30 & 31 Vict. c. 142, s. 5; Marshall *v.* Martin, Law Rep., 5 Q. B. 239.

(*t*) College of Physicians *v.* Harrison, 9 B. & C. 524.

(*u*) 42 & 43 Vict. c. 59.

(*x*) 3 Bl. Com. 400; Ord. xvi. r. 22; Pratt *v.* Delarue, 10 Mee. & W. 512; Doe *v.* Owens, ib. 514; Hall *v.* Ive, 7 Man. & G. 1001; Ord. xvi. rr. 26—30.

Hen. VII. c. 12 and 23 Hen. VIII. c. 15, exempted from the payment of any court fees (*y*). Under the present practice, persons suing or defending as paupers are entitled to have counsel and a solicitor assigned to them without fee; and are excused from paying costs when unsuccessful; though it has been said they shall suffer other punishment at the discretion of the judges (*z*); but a person thus suing or defending may recover costs (being, however, only his costs out of pocket) (*a*), though he pays none; for the counsel and clerks of court are bound to give their labour to *him* only, and not to his antagonist (*b*).

It is, however, to be observed, that, in the Court of Chancery, the costs to be given to either party were never held to be a matter of right; but merely discretionary, according to the circumstances of the case, as these appeared more or less favourable to the party vanquished (*c*). And, indeed, all the rules with regard to costs above mentioned, must be read as being now, generally, subject to that provision of the Judicature Acts, which enacts that the costs of and incident to all proceedings in the High Court of Justice shall be in the discretion of the court: though —subject to this—there is a general direction that, where any action or issue is tried by a jury, *the costs shall follow the event*, unless upon application made at the trial, and good cause shown, the judge before whom such action or issue is tried, or the court, shall otherwise order (*d*). Moreover,

(*y*) Bl. Com. ubi sup. These Acts *in favorem paupertatis* had no application to the case of a *defendant*; whose poverty, however extreme, would not avail him in the matter of costs.

(*z*) Blackstone says (vol. iii. p. 400), that it was formerly usual to give pauper plaintiffs, if nonsuited, their election, *either to be whipped or to pay their costs*; and now, by 56 & 57 Vict. c. 22, the appeals of paupers to the House of Lords have been placed under stringent regulations.

(*a*) Ord. xvi. r. 31; Carson *v.* Pickersgill, 14 Q. B. D. 859.

(*b*) 3 Bl. Com. 401.

(*c*) Ib. 452.

(*d*) Ord. lxv. r. 1; Field *v.* Great Northern Railway Company, 3 Ex. D. 261. But this is not to deprive a trustee, mortgagee, or other person of any right to costs out of a

no order as to costs left by law to the discretion of the court shall (except on leave given) be subject to any appeal (*e*).

V. If the judgment entered in the High Court be not suspended, varied, or reversed by the Court of Appeal, as presently to be mentioned, the next step in the action is the *execution* of that judgment, or putting the sentence of the law in force. For this purpose, there are different writs of execution (*f*); which may issue against the *goods and chattels* of the debtor himself (*g*); or against any *lands, tenements, and hereditaments*, of which he himself, or any person in trust for him, shall have been seised or possessed,—or over which he shall have had any disposing power, exercise-able without the assent of any other person, for his own benefit,—at the time when the judgment is entered up, or at any time afterwards (*h*). But as regards the operation

particular estate or fund "to which he would be entitled according to the rules hitherto acted upon in courts of equity." (Ord. lxv. r. 1; Smith *v.* Dale, 18 Ch. D. 516; Ex parte Russell, In re Butterworth, 19 Ch. D. 588; Hill *v.* Spurgeon, 29 Ch. Div. 348.)

(*e*) 36 & 37 Vict. c. 66, s. 49; Re Bradford, 15 Q. B. D. 635.

(*f*) There are also the writs of *attachment* and *sequestration;* which are properly process of contempt, to enforce obedience to a judgment or order of the court. See further as to these, post, chap. XIII.

(*g*) Until a recent period, execution on a judgment might also, in cases above 20*l.*, have issued against the *person* of the debtor; who might have been arrested and imprisoned, under the writ of *capias ad satisfaciendum;* but, by the 32 & 33 Vict. c. 62 (the Debtors Act, 1869), no person may now be arrested or imprisoned for making default in payment of a sum of money, except in the cases specified in sect. 4 of that Act (as to which see Evans *v.* Bear, Law Rep., 10 Ch. App. 76; Ferguson *v.* Ferguson, ib. 661; Chard *v.* Jervis, 9 Q. B. D. 178; Brooks *v.* Edwards, 21 Ch. D. 230; and 41 & 42 Vict. c. 54); and except that persons who (having the means) refuse or neglect to pay certain small debts (*i.e.* debts not exceeding 50*l.*), due from them in pursuance of any order or judgment, may be committed *for a term of six weeks or until payment* (Hewitson *v.* Sherwin, Law Rep., 10 Eq. Ca. 53); and the committal order may be made either in the superior court or by the county court, according to where the judgment or order was obtained. (Dillon *v.* Cunningham, Law Rep., 8 Exch. 23.)

(*h*) 1 & 2 Vict. c. 110, s. 11.

of judgments on *lands*, the 23 & 24 Vict. c. 38, s. 1, has provided, that, (as regards a purchaser for valuable consideration or a mortgagee,) no judgment to be thereafter entered up shall affect any *land*, unless execution thereon shall have been issued and registered at the proper office of the High Court (that is to say, in the Central Office) (*i*); and the 27 & 28 Vict. c. 112, s. 1, has provided, that no judgment entered up after the 29th July, 1864, shall affect any land until the land shall have been also *actually delivered in execution* (*k*); and has further provided, that the writ, or other process of execution, shall be registered in the name of the debtor against whom it is obtained, instead of (as previously) in the name of the creditor. The provisions of these two statutes were intended to assimilate the effect of judgments, with regard to the *lands* of the debtor, to that which before prevailed with regard to his *goods and chattels*,—which latter, since 19 & 20 Vict. c. 97 (the Mercantile Law Amendment Act, 1856), were bound, as against purchasers without notice, only from the time of the actual seizure thereof under the execution, though, as between the parties themselves to the action, the goods were bound from the date (or teste) of the writ: and the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), while it repeals the last-mentioned Act, enacts to the like effect, only saying more specifically, that the goods shall be bound as from the time when the writ is delivered to the sheriff (sect. 26),—except as against a purchaser in good

A judgment against a mortgagee (which would formerly have bound the land mortgaged, even though the mortgage was paid off and the land actually conveyed to a purchaser or another mortgagee) has no longer that effect. (18 & 19 Vict. c. 15, s. 11.)

(*i*) 4 Will. & M. c. 20; 1 & 2 Vict. c. 110, s. 19; 2 & 3 Vict. c. 11; 18 & 19 Vict. c. 15; Kemp *v.* Waddington, Law Rep., 1 Q. B. 355; Gardner *v.* London Chatham and Dover Railway Co., ib. 2 Ch. App. 385.

(*k*) Guest *v.* Cowbridge Railway Co., Law Rep., 6 Eq. Ca. 619; Mildred *v.* Austin, ib. 8 Eq. Ca. 220; In re Duke of Newcastle, ib. 700; Hatton *v.* Haywood, ib. 9 Ch. App. 229; Anglo-Italian Bank *v.* Davies, 9 Ch. D. 275.

faith and for value who has no notice that the writ has been delivered to, and remains unexecuted with, the sheriff (sect. 26). And further as regards *land*, the Land Charges, Registration and Searches, Act, 1888 (51 & 52 Vict. c. 51), ss. 5, 6, has provided, that all writs of execution, and orders affecting land, shall be registered at the Office of Land Registry, in the special register of writs and orders by that Act established, in lieu of registering the same at the Central Office; and until so registered, shall be void as against a purchaser, mortgagee, or lessee,—any such executions (or orders), which have been already registered at the Central Office, requiring to be registered also at the Office of Land Registry, but not until the expiration of the registration at the Central Office.

In an ordinary legal action, the judgment is in general for the recovery of *money* only, (either as for a debt, or for damages or costs,) and not for the recovery of any specific chattel,—there being, however, an exception to this in the case of *detinue*, in which the judgment is for the recovery of the goods themselves which are detained, or the value thereof, with damages and costs. In detinue accordingly, there was a special process of execution in use (called a *distringas*), to compel the defendant to deliver the goods, by repeated distresses levied upon his chattels (*l*); and in recognition thereof, the Common Law Procedure Act, 1854, expressly provided, that in an action for the detention of a chattel, where there had been a verdict assessing its value, the court or judge might either order that execution should issue for the return of the chattel detained,—and if it could not be found, that the sheriff should distrain the defendant by all his lands and chattels in the bailiwick, until he rendered the chattel,—or else might order that if the chattel could not be found, the sheriff should cause to be made of the defendant's goods the assessed value of the

(*l*) There is an alternative process by way of *writs of attachment* and *sequestration*; but before issuing a writ of attachment, leave must be obtained. See further (as to these writs), post, chap. XIII.

chattel, with damages, costs, and interest besides; and, under the Judicature Acts, this form of execution, under the name of a writ of delivery, is still in force (*m*). And, again, in an action for the *recovery of land*, a judgment for the plaintiff therein, requiring the defendant to deliver the possession thereof to the plaintiff, may be enforced by a writ of *possession* (on filing an affidavit showing that the judgment has been served, and not obeyed); and by such writ of possession, the sheriff is commanded to enter on the land which is the subject of the action, and to cause the plaintiff to have possession thereof with its appurtenances (*n*). But when, as is more frequently the case in the Queen's Bench Division, the judgment in the action is for the recovery of money or costs only, the judgment creditor may resort to one of the writs of execution to be presently mentioned, as soon as such judgment has been duly entered; but it is to be observed, that the writ must be executed within a year from the date of its issue, unless properly renewed. On the other hand, the writ need not be taken out forthwith, but may issue (as between the original parties) at any time within *six years* from the recovery of the judgment; though, after that time, the party alleging himself to be entitled to execution must apply to the court or judge for leave to issue it,—on which application, if the case should so require, it may be ordered that any question, necessary to determine the rights of the parties, shall be tried, in any of the ways in which any question in an action may be tried (*o*).

Prior to the Common Law Procedure Act, 1852, the party seeking to take out execution on a judgment which had lapsed by time, was obliged to sue out a writ of *scire facias*, calling on the opposite party to show cause why execution should not issue; but this practice (which was

(*m*) 17 & 18 Vict. c. 125, s. 78; Chilton *v.* Carrington, 15 C. B. 730; Ord. xlviii.

(*n*) Ord. xlvii.

(*o*) Ord. xlii. r. 23.

cumbersome and dilatory) was altered by the Common Law Procedure Act above mentioned, and a *writ of revivor* substituted, on which an issue was joined, as in an ordinary action, raising the question of liability between the parties; and such question is now raised by the more simple method of applying for leave to issue, as above mentioned.

The sanction of the court, before issuing execution on a judgment, may also be required by reason of the *change of parties* during the action; and this may occur, first, by *death*,—wherein the rule formerly was, that if either of the parties died before final judgment the action would abate; and that if the death took place after final judgment, a *scire facias* was necessary in order to enforce the execution; but by the Common Law Procedure Act, 1852 (in extension of some prior enactments on this subject), it was enacted, that the death of either plaintiff or defendant should not cause the action to abate, but that the proceedings (supposing the right of action to survive) should be continued by or against the proper parties (*p*); and the Judicature Acts contain the like provisions (*q*).

Again, if a female plaintiff or defendant *married*, the action, as the general rule, was thereby abated; and where judgment had been obtained, the plaintiff was driven to his *scire facias* to enforce the judgment against the husband or wife, as the case might require (*r*). But, by the Common Law Procedure Act, 1852, it was directed, that an action should not abate by marriage,—though a suggestion on the record was required, before a joint writ could issue against both husband and wife, on a judgment obtained against the latter before marriage. And the same process, by way of suggestion, was necessary, in case a plaintiff

(*p*) 15 & 16 Vict. c. 76, s. 135; 17 & 18 Vict. c. 125, s. 92.

(*q*) Ord. xvii. (before final judgment); Ord. xlii. (after final judgment).

(*r*) Walker *v.* Goslen, 11 Mee. & W. 78; Underhill *v.* Devereux, 2 Saund. by Wms. 72 *k*.

became a bankrupt, after he had obtained judgment, but before he had issued execution (*s*). And under the Judicature Acts, the law on these matters has not been altered, but the process requisite to carry on the proceedings (at whatever stage of the action the change of parties occurs) has been made more simple,—it being provided, that in the case of the marriage, death, bankruptcy, or devolution of the estate by operation of law, of any party to an action during the pendency thereof,—such order may be made, as to new parties (or as to a change in the capacity in which the original parties sued or were sued), as shall be deemed necessary by the court for a complete settlement of all the questions involved in the action; and this merely upon an *ex parte* application, to be served on any party affected thereby; who, if he objects thereto, must, within twelve days of the service, apply that the order may be discharged or varied (*t*).

The following are the writs of execution by which a judgment for the recovery of money is enforced (*u*) :—

1. A *fieri facias*.—This is an execution against the goods and chattels of the party against whom the judgment is recovered; and it is so termed from the words of the writ, whereby the sheriff is commanded *quod fieri facias de bonis*, that he cause to be made of the goods and chattels of the party, the amount of the judgment debt. From this writ neither peers, nor any other privileged persons, are exempt; and it lies against executors or administrators, with regard to the goods of their deceased testators or intestates (*x*). The sheriff may not break open any outer door to execute the writ: but must enter peaceably (*y*), and may then break

(*s*) Winter *v.* Kretchman, 2 T. R. 45.

(*t*) Ord. xvii. rr. 1—3.

(*u*) The general practice on executions is regulated by Ord. xlii. The writs are in general directed to the sheriff; but in the *County* Courts, are issued, under the seal of the court, to the high bailiff instead.

(*x*) 3 Bl. Com. 417; Fenwick *v.* Laycock, 2 Q. B. 108.

(*y*) 5 Rep. 92.

open any inner door in order to take the goods (*z*); and he cannot execute the writ on a Sunday (*a*); or within the precincts of a royal residence (*b*). The sheriff may sell the goods and chattels of the party against whom the writ is issued (*c*),—including even his estate for years (which is a chattel real), or his growing crops (which are in the nature of personalty),—till he has raised enough to satisfy the judgment (*d*). But this power of sale in the sheriff is subject to certain safeguards and limits, which the law has deemed it reasonable to impose for the protection of landlords; that is to say, First, by 8 Anne, c. 18, the sheriff cannot lawfully sell goods lying upon any premises demised to a tenant, unless the landlord be first paid his rent due before the execution, to the extent, that is to say, of one year's arrears (*e*); and Secondly, by 56 Geo. III. c. 50, no sheriff shall carry off, or sell for the purpose of being carried off, the premises, any straw, hay, manure, or the like from any lands let to farm, in any case where, by the covenants or agreements in the lease, the carrying off the same is prohibited between landlord and tenant; but such produce can only be lawfully sold to some person who will agree, in writing, to use and expend the same upon the lands, according to the obligation of the tenant (*f*);

(*z*) Palm. 54; Morrish *v.* Murray, 13 Mee. & W. 52.

(*a*) Arch. Pr. 13th ed. p. 527.

(*b*) Att.-Gen. *v.* Dakin, Law Rep., 4 H. L. 338; Combe *v.* De la Bere, 22 Ch. D. 316.

(*c*) The sale may be either by auction or by private treaty; and it is not unusual for the sheriff to hand over the goods to the execution creditor himself, at a fair valuation. (Herniman *v.* Bowker, 25 L. J., Exch. 69.)

(*d*) 3 Bl. Com. 417.

(*e*) Rissley *v.* Ryle, 11 Mee. & W. 17; Wollaston *v.* Stafford, 15 C. B. 278. It is, however, provided, by 7 & 8 Vict. c. 96, s. 67, that no landlord of any tenement let at a *weekly* rent shall have any claim or lien upon any goods taken in execution under the process of any court of law, for more than *four weeks'* arrears of rent; and, in like manner, in case of a tenement let for any other term *less than a year*, the landlord shall not have any such claim or lien for more than the arrears of rent accruing during *four* such terms or times of payment (Wharton *v.* Naylor, 12 Q. B. 673).

(*f*) Wilmot *v.* Rose, 3 Ell. & Bl. 563.

and Lastly, by 14 & 15 Vict. c. 25, s. 2, if growing crops are seized and sold on a *fi. fa.* or other writ of execution by the sheriff, they shall still, so long as they remain on the lands (and where there is no other sufficient distress), be liable to be distrained for rent becoming due from the tenant after such seizure and sale. And although, by the common law, no personal chattel which was not in its nature properly capable both of manual seizure and of sale could be taken under this writ; yet now, by 1 & 2 Vict. c. 110, s. 12, the sheriff may take any *money*, *bank notes*, *bills of exchange*, or other *securities for money*, belonging to the party against whom the writ is sued out (*g*); and may also sue upon such bills or securities in his own name, paying over the money to be recovered thereon to the creditor. In case the sheriff is unable to sell, at a reasonable price, the goods taken in execution, he may make his return upon the writ, that they remain in his hands for want of buyers,—upon which the party suing out the execution may proceed to take out a writ of *venditioni exponas;* and under this latter writ, called a writ *assistant*, the sheriff is bound to sell the goods at all hazards, *i. e.*, for the best price that can be obtained, however inadequate (*h*).

2. Another species of execution mentioned in the books was the writ of *levari facias;* which affected a man's goods and the *profits* of his lands,—this writ commanding the sheriff to levy the judgment debt on the lands and goods of the party against whom it was issued; and on this writ the sheriff seized all the debtor's goods, and received the rents and profits of his lands, till satisfaction was made (*i*). No use, however, had in modern practice been made of this writ against ordinary judgment debtors,—the remedy by the writ next to be mentioned, which takes possession of the lands themselves, having been found much more effectual;

(*g*) Collingridge *v.* Paxton, 11 C. B. 683.

(*h*) Keightley *v.* Birch, 3 Camp. 521; Ord. xliii. r. 2.

(*i*) Finch, L. 471.

and now no writ of *levari facias* may issue in any civil proceeding (*k*). But analogous to the writ of *levari facias* was a writ of execution, proper only against the clergy; and which was and is given, when the sheriff, upon a common writ of *fieri facias*, returns *nulla bona*, and that the party is a beneficed clerk, not having any lay fee (*l*). In which latter case, inasmuch as *bona ecclesiastica* are not to be touched by lay hands, a writ goes to the bishop of the diocese, in the nature of a *levari facias* (*m*), but which is termed a *sequestrari facias de bonis ecclesiasticis*, commanding the bishop to enter into the benefice, and to take and sequester the same into his possession; and to hold the same until he shall have levied the amount of the judgment out of the rents, tithes, and profits thereof (*n*); and thereupon the bishop sends out a *sequestration* of the profits of the clerk's benefice,—directing the churchwardens to collect such profits, and, after providing thereout for the offices of the church, to pay over the surplus to the judgment creditor, until the full sum due to him be raised (*o*).

3. A third species of execution is by writ of *elegit;* which was given by the Statute of Westminster the second, 13 Edw. I. c. 18 (*p*). Before that statute, a man could only have the *profits* of land in satisfaction of his judgment, but not the possession of the lands themselves,—which was a natural consequence of the early feudal principles, which limited, in a very strict manner, even the right of voluntary alienation (*q*); and when that restriction began to wear away, the consequence still continued. And inasmuch as the creditor could not take possession of the land, but only levy the growing profits thereof, the plaintiff was ousted of his remedy, if the defendant aliened

(*k*) 46 & 47 Vict. c. 52, s. 146.

(*l*) 3 Bl. Com. 418.

(*m*) Reg. Orig. 300; Judic. 22; 2 Inst. 4.

(*n*) Harding *v.* Hall, 10 Mee. & W. 42; Ord. xliii. r. 5.

(*o*) Vide sup. vol. II. pp. 659, 687.

(*p*) Sherwood *v.* Clark, 15 Mee. & W. 764; Carter *v.* Hughes, 2 H. & N. 714.

(*q*) Vide sup. vol. I. p. 439.

his lands; wherefore the statute 13 Edw. I. c. 18, granted this writ,—called an *elegit*, because it is in the choice of the judgment creditor, whether he will or will not sue out this writ—by which the judgment debtor's goods and chattels were not sold as on a *fi. fa.*, but only appraised, and then, (except oxen and beasts of the plough,) offered to the judgment creditor at such reasonable appraisement and price in satisfaction of his debt (*r*); and if the goods of the debtor proved not to be sufficient, then—according to the law as it stood from the time of the passing of the Statute of Westminster the second until the commencement of the present reign,—one *moiety* of the debtor's lands of freehold tenure, which he had at the time of the judgment given, whether held in his own name or by any other in trust for him, were also to be delivered to the judgment creditor,—to hold till out of the rents and profits thereof the debt was levied, or till the judgment debtor's interest therein expired (*s*). And now, by 1 & 2 Vict. c. 110, s. 11, the sheriff delivers, in execution upon an elegit, the entirety of *all* the lands, tenements and hereditaments, (including those of copyhold or customary tenure,) which the judgment debtor, or any person in trust for him, shall have been seised or possessed of at the time of entering up the judgment, or at any time afterwards,—including those over which the debtor shall, at the time of entering up the judgment or at any time afterwards, have any *disposing power* which he may, without the assent of any other person, exercise for his own benefit (*t*). And, by 27 & 28

(*r*) 3 Bl. Com. 418.

(*s*) 2 Inst. 395; 29 Car. 2, c. 3.

(*t*) An elegit is always *returned* by the sheriff (that is, it is filed in court after execution), so as to complete the tenant's title; and in this respect, it differs from a *fi. fa.*; which is not usually returned by the sheriff, unless he is *ruled* to do so (Arch. Pr. 13th ed. 532). When it is returned upon an *elegit*, that land has been delivered to the plaintiff,—he is entitled at once, (subject to the estates of any parties which commenced before the judgment,) to enter upon such land, peaceably; or, if necessary, to recover it by action;

Vict. c. 112, s. 4, every creditor to whom his debtor's land shall have been *actually delivered* in execution under a judgment, and whose writ or other process of execution shall be duly registered, may, during the time that such registry shall continue in force, obtain an order for the sale of his debtor's interest in such land (*u*); and such order, which used to be obtained only on petition, is now to be obtained, in general, on summons (*x*). But it is to be noted, that the writ of elegit is not now available for the seizure of *goods* in execution (*y*).

Besides these several writs of execution, the judgment creditor was enabled, by the 1 & 2 Vict. c. 110, ss. 14, 15, and 3 & 4 Vict. c. 82, s. 1, to resort to other modes of proceeding, to enforce payment of his debt out of property which these writs could not in their nature conveniently reach. For, on the application of any creditor who has entered up judgment, a judge may, under these statutes, order, that the property of the debtor in government stock, or in the stock of any public company in England, corporate or otherwise, shall (whether standing in the debtor's own name or in the name of any person in trust for him) stand *charged* with the payment of the amount for which judgment shall have been recovered, with interest,—so as to give the judgment creditor the same remedies as if the charge had been voluntarily made in his favour by the judgment debtor (*z*); but no proceedings can be taken on such judge's order, till after *six calendar months* from its date (*a*). And in further aid of the judgment creditor, the Common Law

on which issues the writ of possession (*habere facias possessionem*); and only after such entry, or writ, is he *tenant by elegit*.

(*u*) In re Bishop's Waltham Railway Co., Law Rep., 2 Ch. App. 382.

(*x*) Ord. lv. (Nov. 1893), r. 9*b*.

(*y*) 46 & 47 Vict. c. 52, s. 146.

(*z*) Ord. xlvi.; 5 Vict. c. 8.

(*a*) Churchill *v.* Bank of England, 11 Mee. & W. 323; Dixon *v.* Wrench, Law Rep., 4 Exch. 154; Haly *v.* Barry, ib. 3 Ch. App. 452.

Procedure Act, 1854 (*b*), provided, that he might apply for a rule or order to have the judgment debtor orally examined, as to the debts owing to him by any third person; and might also make application for an order, that all debts (*c*) found to be due from any third person, (called the *garnishee*,) to the judgment debtor, should be *attached* to answer the judgment debt. Now the effect of the service of the order to attach such debts was to bind them in the garnishee's hands (*d*); and if the garnishee failed to appear upon summons to show cause why he should not pay the judgment creditor the debts attached, or so much as would suffice to pay the judgment debt,—or if, on appearance, he failed to make such payment forthwith, and yet did not dispute the debt alleged to be due from him, the judge might order execution against him for the amount; and on the other hand, if he disputed his liability, the judge might order, that the judgment creditor should be at liberty to proceed against him and to recover the same, as in an ordinary action (*e*); and, under the new procedure introduced by the Judicature Acts, an issue will be framed (without any fresh action) to decide the question (*f*).

These are the methods which the law of England allows for the execution of judgments in their ordinary course (*g*); and when the demand of the judgment creditor is satisfied, either by the voluntary payment of the debtor, or by this compulsory process, or otherwise, *satisfaction* ought to

(*b*) 17 & 18 Vict. c. 125, ss. 60—67; 23 & 24 Vict. c. 126, ss. 28—31; Holmes *v.* Tutton, 5 Ell. & Bl. 65; Johnson *v.* Diamond, 11 Exch. 431; Dresser *v.* Johns, 6 C. B. (N. S.) 429.

(*c*) Re Paice, Law Rep., 4 C. P. 155; Horsley *v.* Cox, ib. 4 Ch. App. 92; Hall *v.* Pritchett, 3 Q. B. D. 215.

(*d*) Ord. xlii. r. 32; Sampson *v.* Seaton Railway Company, Law Rep., 10 Q. B. 28; Tapp *v.* Jones, ib. 591.

(*e*) Ord. xlv.

(*f*) Ord. xlv. r. 6.

(*g*) 3 Bl. Com. 421. Until the year 1869, there was also in common use the writ of *capias ad satisfaciendum;* under which, the *person* of the debtor was taken instead of his property, till he made satisfaction for the debt, damages, and costs recovered by the judgment; as to which writ, vide sup. p. 612, n. (*g*).

be *entered on record*,—to the end that the debtor may not be liable to be hereafter harassed, a second time on the same account (*h*).

VI. Proceedings by way of *Appeal*. In what has been hitherto said, it has been supposed that the action in the High Court has run its regular course; but it is to be understood, that though final judgment may have been entered therein, such judgment may nevertheless, if erroneous, be relieved against in the *Court of Appeal* (*i*). Now, before the Judicature Acts, the method of setting right a final common law judgment, where the fault appeared by the record itself, was by proceedings *in error* (*k*),—and

(*h*) 23 & 24 Vict. c. 115, s. 2; 30 & 31 Vict. c. 47; Arch. Pr. (13th ed.) 638.

(*i*) Blackstone (vol. iii. pp. 402, 405) speaks also of a writ of *attaint*, a writ of *deceit*, and a writ of *auditâ querelâ*, among the methods of relief from a judgment; but all three are now abolished. The writ of *attaint* we have before had occasion to notice (vide sup. p. 603, n. (*p*). The writ of *deceit* was an action brought in the Common Pleas to reverse a judgment obtained in a *real* action, by fraud or collusion between the parties, to the prejudice of a third person; it was abolished by 3 & 4 Will. 4, c. 27, s. 36. The *auditâ querelâ* was a writ for a defendant against whom judgment had been given,—but who was entitled to be relieved upon some matter of discharge since the judgment, as a general release from the plaintiff, or payment of the debt sued for; and it stated, that the complaint of the defendant had been heard, *auditâ querelâ defendentis;* and set forth the matter of complaint; and enjoined the court to call the parties before them, and cause justice to be done; but by Ord. xlii. r. 27, no proceeding by *auditâ querelâ* shall now be used; but any party may apply summarily for a stay of execution or relief against a judgment, upon the ground of facts which have come too late to be pleaded. (Holmes *v.* Pemberton, 1 E. & E. 367.)

(*k*) Proceedings in error used, at one period, to begin by a *writ* sued out of the common law side of the Court of Chancery addressed to the chief justice of the court in which the judgment was given, and commanding him to send a transcript of the record to the Court of Error; but, by 15 & 16 Vict. c. 76, s. 148, this writ was dispensed with in almost every case (Arding *v.* Holmer, 26 L. J., Exch. 72). There were errors *in fact*, and errors *in law;* an instance of the first kind being that the defendant being an infant appeared by solicitor instead of guardian; and an error in law

in the case of a decision of the court in regard to an application for a new trial, or as to a point reserved (*l*), was by way of *appeal;* but the Judicature Acts abolished proceedings in error altogether; and substituted an appeal, in all cases, where the Court of Appeal had occasion to deal with what had taken place in the High Court. And these Acts have also given the Court of Appeal much more elastic powers than were exercised in the previous court of error, having provided (in effect), that the Court of Appeal shall have all the powers and duties, as to amendment and otherwise, of the court of first instance,—with full discretionary power to receive further evidence (not raising an altogether new and inconsistent case) upon *questions of fact*, and generally to give such judgment as ought to have been given in the High Court (*m*). The Court of Appeal may also deal with any interlocutory order made in the action; including (if leave be given by the court or judge making the order) orders as to discretionary costs, and orders made by consent (*n*). But (except by special leave) no appeal shall be made from an interlocutory order after the expiration of twenty-one (now fourteen) days, or any other appeal after the expiration of one year (now three months) (*o*),—and no appeal now operates as a *stay of execution*, or as a stay of proceedings under the judgment, order, or other decision appealed from, except so far as the court appealed from, or any judge thereof, or the Court of Appeal itself, may direct (*p*).

With regard to the manner of appealing, the Acts pro-

was founded on some mistake in law apparent on the face of the record, such as might have formed the subject of a demurrer.

(*l*) 17 & 18 Vict. c. 125, ss. 34, 35.

(*m*) Ord. lviii. r. 4. This includes the power of ordering a *new trial* (Ord. lviii. r. 5); and so, conversely, upon an application for a new trial, the Court of Appeal may treat the application as an appeal (Ord. xl. r. 10).

(*n*) 36 & 37 Vict. c. 66, s. 49.

(*o*) Ord. lviii. r. 15 (as amended November, 1893).

(*p*) Ibid. r. 16. The rules also contain provisions with regard to *cross* appeals; and with regard to the mode of bringing the evidence in the court below before the Court of Appeal (ibid. rr. 6, 11).

vide, that all appeals from the High Court of Justice to the Court of Appeal shall be by way of *rehearing* (*q*); and shall be brought by motion in a summary way, without petition, case, or other formal proceedings other than a notice of motion (*r*)—such notice being served upon all the parties directly affected by the appeal, and on them alone; though the Court of Appeal may direct the notice of appeal to be served on any person, whether party or not to the action or other proceeding; and in the meantime, may postpone or adjourn the hearing of the appeal, upon such terms as shall be just (*s*).

Some other provisions of the Judicature Acts, with reference to matters of appeal, may here be noticed. Thus:—1. Although as the general rule, every appeal from a final judgment or order is to be determined before not less than three judges of the court sitting together—or from an interlocutory order before two judges so sitting (*t*)—yet, in any cause or matter pending before the Court of Appeal, any direction *incidental* thereto may be given by a single judge of that Court; who may also, during vacation, make such "interim orders" as he pleases, to prevent prejudice to the parties (*u*): 2. No judge of the Court of Appeal shall sit as a judge on the hearing of an appeal from any judgment or order made by himself; or by any divisional court of the High Court of which he was and is a member (*x*); unless in cases where he was not present at, and took no part on, the hearing before the divisional court (*y*): and 3. No appeal lies from the decision of the High Court, in any case wherein it has been provided by any statute that the decision of any court or judge whereof the jurisdiction is transferred to the High Court is to be final (*z*).

(*q*) Ord. lviii. r. 1.
(*r*) Ibid. r. 2.
(*s*) Ibid.
(*t*) 38 & 39 Vict. c. 77, s. 12.
(*u*) 36 & 37 Vict. c. 66, s. 52.
(*x*) 38 & 39 Vict. c. 77, s. 4; Fisher *v.* Val de Travers Co., 1 C. P. D. 259, et sup. p. 389.
(*y*) 44 & 45 Vict. c. 68, s. 11.
(*z*) 39 & 40 Vict. c. 59, s. 20; 36 & 37 Vict. c. 66, s. 45; Beresford-Hope *v.* Lady Sandhurst, 23 Q. B. D. 79.

CHAPTER XII.

OF INTERLOCUTORY AND INCIDENTAL PROCEEDINGS, AND HEREIN OF PREROGATIVE WRITS.

HAVING now taken a comprehensive view of the regular course of an action, it will be proper to advert to certain proceedings which are capable of being resorted to at any time during the progress of the action, and which therefore are termed *interlocutory;* and to advert also to certain extraordinary remedies, distinct in their nature from actions, and which are called *prerogative writs* (*a*),—proceedings of the interlocutory class, and proceedings taken with a view to the issue of a prerogative writ, being in general both commenced by way of "*motion.*"

I. *Motions.*—These are applications to the court itself; and when similar applications are (as they sometimes may be) made at the chambers of the judge, then they are made by *summons;* but the latter mode of proceeding is more adapted to matters of mere practice and routine (*b*). A

(*a*) 3 Bl. Com. 132.

(*b*) 30 & 31 Vict. c. 68; 36 & 37 Vict. c. 66, s. 39; and 47 & 48 Vict. c. 61, s. 13; and Ord. liv. which prescribes that all business which may be lawfully transacted by a *judge at chambers* may be transacted in the common law divisions by a *master;* and in the probate, divorce, and admiralty division by a *registrar*,—with the exceptions specified in rule 12 of that order; and an appeal lies from the master to a judge at chambers, and from him to the court; and any matter may be referred by the master to the court for decision. (Ibid. rr. 20, 21.) As regards matters in the

motion, then, is an application made to a judge (or to a divisional court) *vivâ voce*, in open court (*c*); and can be made in general by any one on his own behalf; but otherwise (excepting in the Bankruptcy Division) only by counsel, to the exclusion of solicitors (*d*); and, in practice, it is usually supported by an *affidavit* of the matters of fact on which it is founded (*e*). The object of the motion is, in general, to obtain an order (or *rule*) directing, in favour of the applicant, some act to be done or abstained from by some other person,—which order or rule, when obtained, is served

chancery division which come on at chambers, these are regulated for the most part by Order lv., and as a rule come on before the chief clerk in the first instance, and may either be decided by him, or may be referred (*i. e.* adjourned) by him, either of his own motion or at the request of either or any of the parties, to the judge himself; and the judge will either decide them in chambers, or (in case of difficulty) will adjourn them into open court.

(*c*) Under the Judicature Acts, two or more of the judges of the High Court sitting together are termed Divisional Courts (corresponding to the old sittings in *banc*); and certain matters are prescribed to be determined by a divisional court, instead of by a single judge; *e. g.*, proceedings on the crown side of the Queen's Bench Division; appeals from the county courts; proceedings under any statute wherein the decision of the court is final; and formerly appeals from the judge at chambers in the common law divisions (36 & 37 Vict. c. 66, s. 41; 38 & 39 Vict. c. 77, s. 17; and Ord. lix. r. 1); but these latter now go to the Court of Appeal direct (57 & 58 Vict. c. 16, s. 1),—at least in matters of practice and procedure.

(*d*) On the other hand, counsel have no exclusive audience at *chambers;* although any party may have the assistance of counsel there (Order lv. r. 1*a*).

(*e*) *Affidavits* are made on various occasions; and are sworn in court, or before some officer appointed to take affidavits in such court. Under the Judicature Acts, it is provided, that, on any *motion*, *petition*, or *summons*, evidence may be given by affidavit, subject to an order for the attendance for cross-examination of the person making such affidavit on the application of either party (Ord. xxxvii. r. 2); and that affidavits shall be confined to such facts as the witness is able of his own knowledge to prove,—except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted; and that the costs of every affidavit which shall unnecessarily set forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same (ib. r. 3).

upon the party affected by it. The rule so moved for used to be, and occasionally still is, moved for *ex parte;* and is, in its form, either a rule to *show cause* (otherwise called a rule *nisi*), commanding the party, on a certain day therein named, to show cause to the court why he should not perform the act, or submit to the terms therein set forth; or else it is a rule *absolute in the first instance*, commanding the thing to be done, without the appointment of any day to show cause. But if the rule be a rule *nisi*, the counsel for the party on whom it has been served, appears on the day appointed, and is heard in opposition to it; and the counsel by whom it was moved having been afterwards heard in reply, the court either discharges the rule, or makes it absolute, as the case may be,—and that upon the terms, either that the costs of the application be paid by one of the parties to the other, or without costs, as may appear most just under the circumstances of the case; but if the party served with the rule fail to appear in opposition to it, it is made absolute as a matter of course. If made absolute, a new rule to that effect is then served on the party ruled; and he is bound to obey it, upon peril of being attached for contempt,—a course taken by the court in vindication of its own authority; and under which the party attached is liable to coercion by the arrest of his person.

It may be observed, that, prior to the time at which the Judicature Acts came into operation, the larger number of motions were for a rule to show cause; but the reason for framing the application in this form has now ceased,—inasmuch as, under the present regulations, every motion (except where, under the former practice, it would have been for a rule absolute in the first instance, and in some few other instances mentioned in the Rules) must be preceded by a notice to the party to be affected thereby (*f*); and the course, therefore, now is, that no rule or order

(*f*) Ord. lii. r. 2.

to show cause is granted *in any action* (for the practice is thus limited), except in such cases as are expressly authorized by the Rules (*h*); and consequently (except in such few cases), all motions are now on notice, and the matter is finally disposed of, when it is first brought before the court.

II. *Interpleader*.—This is an application (usually dealt with at chambers), which may be made under certain circumstances for relief from adverse claims (*i*). It often happens, that a man finds himself exposed to the adverse claims of two opposite parties, each requiring him to pay a certain sum of money, or to deliver certain goods; and that he is unable to comply safely with the requisition of either, because a reasonable doubt exists to which of them the property in truth belongs. Formerly, a person so circumstanced had no means of relief except by instituting in Chancery a bill of interpleader,—which was a proceeding both dilatory and expensive; but under the 1 & 2 Will. IV. c. 58 (amended by 23 & 24 Vict. c. 126, ss. 12—18), upon application made on behalf of the defendant in an action of promises, debt, detinue, or trover, showing that the defendant claimed no interest in the subject-matter of the suit, and that the right thereto was claimed by, or supposed to belong to, some third party (who had sued, or was expected to sue, the defendant for the same), and that the defendant did not in any manner collude with such third party, but was ready to bring into court, or to pay or dispose of the subject-matter of the action in such manner as he might be directed, the court or a judge might order such third party to appear, and to state the nature and particulars of his claim, and either to maintain or relinquish the same; and if he maintained it, to make himself defendant in the action already commenced, or

(*h*) Ord. lii. r. 2. The appeal from a county court to a divisional court is now also by motion *on notice* (51 & 52 Vict. c. 43, ss. 120—125; Ord. lix. rr. 9—17).

(*i*) Ord. lvii.; 47 & 48 Vict. c. 61, s. 17.

otherwise as the case might require; or, with the consent of the plaintiff and such third party, and in matters of trivial amount without any such consent, the court or a judge might dispose of the question between them in a summary manner; and the Judicature Acts have provided, with respect to interpleader, that the procedure and practice previously in use in the courts of common law shall apply to all interpleader actions in the High Court. And with regard to interpleaders under the present practice, these points may be observed:—(1) That the defendant may interplead at any time after having been served with a writ of summons and before delivering his defence (*k*); (2) That the sheriff may interplead, where his levy at the suit of the execution-creditor is hindered by some person (other than the execution-debtor) claiming the goods seized (*l*); (3) That the old affidavit of no collusion and of no interest is still required (*m*); and where the defendant is the applicant in the interpleader, as he submits to deal with the property as the court shall direct, the court usually stays all further proceedings in the action (*n*); (4) That the court may either summarily dispose of the question, where both parties consent, or where (the matter being a small one) either party requests that mode of decision (*o*); or may put the issue of fact or of law in a formal shape for trial (*p*); and (5) That the decision of the court on the issue is always appealable, but the decision in a summary way is not appealable even by leave (*q*). Also, it is to be known, that under the provisions of the Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 17, interpleader proceedings in the High Court, in which the amount or value of the matter in dispute does not exceed 500*l.* (being the limit to the equitable jurisdiction of the county court), may be removed into the county court, by order of any

(*k*) Ord. lvii. r. 4.
(*l*) Ib. r. 1.
(*m*) Ib. r. 2.
(*n*) Ib. r. 6.
(*o*) Ib. r. 8.
(*p*) Ib. rr. 7, 9.
(*q*) Ib. r. 11; Lyon *v.* Morris, 19 Q. B. D. 139.

judge of the High Court, whenever these proceedings may be more conveniently tried in such inferior court; and the order of removal or transfer is to have the same effect as an order of transfer under sect. 8 of the County Courts Act, 1867 (or now under sect. 65, or sect. 69, of the County Courts Act, 1888).

III. *Interlocutory Applications.*—These applications may be made at any stage in an action; and we can only here briefly notice some of the more important of them.

And firstly, when by any contract a *primâ facie* case of liability is established, and there is alleged as matter of defence a right to be relieved wholly or partially from such liability, the court or judge may make an interlocutory order for the preservation or interim *custody* of the subject-matter of the litigation,—or may order that the amount in dispute be brought into court, or otherwise secured (*r*). Also, upon the application of any party to an action, and upon such terms as may seem just, the court or judge may make any order for the *detention*, *preservation*, or *inspection* of any property being the subject of such action; and may authorize any persons to *enter* upon or into any land or building in the possession of any party to such action; and for all or any of the purposes aforesaid may authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence (*s*). Again, the court or a judge, on the application of a party to any action, may make an order for the *sale*, by such person or persons as shall be named in such order, and in such manner and on such terms as to the court or judge may seem desirable, of any goods, wares, or merchandize, which may be of a perishable nature or likely to injure from keeping, or which for other just and sufficient reason it may be desirable to have sold at once (*t*).

(*r*) Ord. l. r. 1. (*s*) Ib. r. 3. (*t*) Ib. r. 2.

Also, when some specific property (other than land) is claimed, or counter-claimed, and the title of the claimant is not disputed, but a right to *retain* the property is set up by way of lien or otherwise, the court or a judge may order that the property claimed or counter-claimed be *given up* to the opposite party, on his paying into court, to abide the event of the action, a sum of money sufficient to satisfy the lien or other security (*u*).

And secondly, a mandamus or an injunction may be granted, or a receiver of any property in the suit appointed, by an interlocutory order of the court, in all cases in which it shall appear "*just or convenient*" that such order should be made (*x*); and if an injunction is asked to prevent any threatened waste or trespass, it may be granted, whether the person against whom it is sought is or is not in possession, under any claim of title; or, (if out of possession,) whether he does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or are equitable (*y*).

IV. *Writ of Scire Facias.*—This is a writ (founded on some record) requiring the person against whom it is brought, to show cause why the party bringing it should not have advantage of the record; or else, why the record should not be annulled and vacated (*z*). An instance of the former species would be, when brought in order to obtain restitution after a judgment has been reversed on appeal (*a*); and of the latter species, when the writ is not supplementary to an action, but is an independent and original proceeding,—as a *scire facias* (and now a petition in the nature thereof) to repeal a patent (*b*); or a *scire facias*

(*u*) Ord. l. r. 8.

(*x*) 36 & 37 Vict. c. 66, s. 28, sub-s. 8; Ord. l. r. 6; Smith *v.* Day, 21 Ch. Div. 421; Griffith *v.* Blake, 27 Ch. Div. 474.

(*y*) 36 & 37 Vict. c. 66, s. 25, sub-s. 8.

(*z*) Arch. Pr. (13th ed.), p. 934.

(*a*) 15 & 16 Vict. c. 76, s. 132.

(*b*) 12 & 13 Vict. c. 109, s. 29; 15 & 16 Vict. c. 83, s. 15; 46 & 47 Vict. c. 57, s. 26.

to make the individual members of a company liable upon a judgment recovered against their public officer, sued as representing the company. No mention of a *scire facias* is made in the Judicature Acts; but as it was considered in law an action (*c*), it may be presumed to come, at least for some purposes, under the provisions of these Acts. But a *scire facias*, to enforce, *e. g.*, a bond given to the Crown, is itself a writ, and requires the defendant, within fourteen days, to plead thereto; and in pleading to a supplementary *scire facias*, the defendant shall make no defence which he might have made originally in the action (*d*).

V. *Writ of Procedendo.*—This writ issues when the judge of an inferior court doth delay the parties; for that he will not give judgment, either on the one side or the other, when he ought so to do (*e*). In such a case, a *procedendo ad judicium* shall be awarded, commanding the inferior court, in the name of the crown, to proceed to judgment; and upon further neglect or refusal, the judge of the inferior court may be punished for his contempt, by writ of attachment returnable in the High Court. A *procedendo* may also be awarded out of the High Court, where an action has been removed to it from an inferior court, and it appears to have been removed on insufficient grounds (*f*); and by 21 Jac. I. c. 23, a suit once so remanded, shall not be again removed before judgment into any court whatsoever.

VI. *The Writ of Mandamus.*—In treating of this remedy, we shall refer mainly, and in the first instance, to the common law or *prerogative* writ; though we shall add a few words as to a species of *mandamus* which was first

(*c*) Arch. Pr. (13th ed.), p. 934.

(*d*) Underhill *v.* Devereux, 2 Saund. by Wms. 72 t; Fowler *v.* Rickerby, 2 Man. & Gr. 760.

(*e*) F. N. B. 153, 240.

(*f*) 21 Jac. 1, c. 23; Jac. Dict. *Procedendo;* Garton *v.* Great Western Railway Company, 1 E. & E. 258.

introduced by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), and which may be described as a *mandamus incidental to an action or other proceeding* (*g*).

1. Firstly, as regards the *Prerogative Mandamus*.—The power of issuing this writ belongs exclusively to the Queen's Bench Division of the High Court of Justice (*h*). [It is a high prerogative writ, of a most extensive remedial nature: and is, in its form, a command issuing in the Queen's name, and directed to any person, corporation, or inferior court of judicature, within the crown's dominions, requiring him or them to do some particular thing therein specified which appertains to their office and duty; and which the court has previously determined, or at least assumes, to be consonant to right and justice. In its application, it may be considered as confined to cases where relief is required in respect of the infringement of some *public* right or duty (*i*), and where no effectual relief can be obtained in the ordinary course of an action (*k*). Such is the general principle; but as to the specific instances in which the writ will be granted, they are much too numerous for complete detail (*l*); but (among other cases) this writ lies, to compel, *e.g.*, the admission or restoration of the applicant to any office or franchise of a public

(*g*) Even prior to this Act, there was, for one purpose, a *mandamus* auxiliary to an action, viz., the *mandamus* to examine witnesses in India and other British dominions in foreign parts (13 Geo. 3, c. 63, s. 44, and 1 Will. 4, c. 22, s. 1).

(*h*) 36 & 37 Vict. c. 66, s. 34; Ord. liii. r. 5; Hedley *v.* Bates, 13 Ch. D. 498; Aslatt *v.* Southampton Corporation, 16 Ch. D. 143; Hayward *v.* East London Waterworks Co., 28 Ch. Div. 138.

(*i*) R. *v.* Bank of England, 2 B. & Ald. 622.

(*k*) R. *v.* Bishop of Chester, 1 T. R. 396; The Queen *v.* Lancashire & Yorkshire Railway Company, 1 Ell. & Bl. 228. It is no objection to granting a *mandamus*, that the party against whom the complaint is made may be proceeded against by *indictment* (R. *v.* Severn Railway Company, 2 B. & Ald. 646); but the existence of a specific civil remedy is always an objection to the issue of a mandamus (In re Nathan, 12 Q. B. D. 461; Reg. *v.* Registrar of Joint Stock Companies, 21 Q. B. D. 131).

(*l*) 1 Chit. Gen. Pr. of Law, 789; Ex parte Lee, Ell. Bl. & Ell. 863; The Queen *v.* Southampton, 1 Ell. Bl. & E. 5.

[nature, (whether spiritual or temporal,) to academical degrees, to the use of a meeting house, or the like; and it will also be granted for the production, inspection, or delivery of public books and papers; or to compel the surrender of the regalia of a corporation; or to oblige bodies corporate to affix their common seal; or to compel the holding of a court,—or the proceeding to an election in corporate and other public offices (*m*). In addition to which, we may notice, as another important application of this writ, that a mandamus (or an order in the nature thereof) will issue to the judges of inferior courts, commanding them to do justice according to the power of their office, whenever the same is delayed (*n*); for it is the peculiar business of the Queen's Bench to superintend inferior tribunals, and to enforce therein the due exercise of those judicial or ministerial powers with which the crown or legislature have invested them,—and this not only by restraining their excesses, but also by quickening their diligence, and obviating their denial of justice.

This writ is granted on a suggestion, upon the oath of the party injured, of his own right and the denial of justice elsewhere,—a refusal being one of the essentials to the issue of the writ (*o*). And in order more fully to satisfy the court that there is a probable ground for such interposition, a rule is made,—except under particular circumstances, where a rule will be granted absolute in the first instance (*p*),—directing the party complained of to show

(*m*) 11 Geo. 1, c. 4; 7 Will. 4 & 1 Vict. c. 78, s. 24; R. *v.* Norwich, 1 B. & Adol. 310.

(*n*) Under the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 131, repealing and re-enacting a former provision to the like effect contained in the 19 & 20 Vict. c. 108, s. 43 (amended by 21 & 22 Vict. c. 47, s. 4), no writ of mandamus, but only an order or summons in the nature of a mandamus, shall issue to a judge or officer of a county court, *for refusing to do any act relating to the duties of his office;* and the same is the course with regard to a *stipendiary* or other magistrate (11 & 12 Vict. c. 44, s. 5).

(*o*) R. *v.* Brecknock, &c. Company, 3 A. & E. 217.

(*p*) R. *v.* Archdeacon of Lichfield,

[cause why a writ of *mandamus* should not issue; and if he shows no sufficient cause, and does not submit without contest to the application, the writ itself is issued at first in the alternative, either to do this, or else to signify some reason to the contrary,—to which a *return* or answer must be made at a certain day. If the person to whom the writ is directed makes no return, he is punishable for his contempt by attachment; and if he makes a return, and it be found either insufficient in law, or false in fact, there then issues in the second place a *peremptory mandamus* to do the thing absolutely,—to which no other return will be admitted, but a certificate of perfect obedience to, and compliance with, the writ (*q*).]

The sufficiency of the return, in *point of law*, was formerly determined, unless a special argument were ordered, in a summary way upon motion. But as to the truth of its allegations *in point of fact*, it was a rule, that this could not be investigated by any further proceeding on the *mandamus*,—the complaining party having no remedy in case the facts were untruly alleged, save that of an action on the case for a false return; in which action, if he obtained a verdict, he recovered damages equivalent to the injury sustained, together with a peremptory *mandamus* to the defendant. But now, by 1 Will. IV. c. 21, in all cases of *mandamus*, the return may be pleaded to or traversed by the prosecutor, and his antagonist may reply, take issue or (in effect) demur, and the same proceedings may be had as if an action had been brought for making a false return; so that now the writ of *mandamus* is, (from the period at least of its return,) assimilated to an action; and the more closely, because it is also provided, that the prosecutor, if successful, shall recover damages, and that the successful party shall, in all cases, upon judgment after issue joined or by default, be entitled to his costs (*r*). In addition to

5 Nev. & M. 42; 6 & 7 Vict. c. 89, s. 5; 17 & 18 Vict. c. 125, s. 76; Crown Office Rules (1886), rr. 60–79.

(*q*) R. *v.* Ledgard, 1 Q. B. 616.

(*r*) R. *v.* Oundle, 1 A. & E.

which, it was enacted, by 6 & 7 Vict. c. 67, that a prosecutor objecting to the validity of the return, should do so by way of demurrer to the same, in like manner as in an action; and thereupon the writ, return, and demurrer should be entered on record, and the court should adjudge either that the return was valid in law, or that it was not valid in law, or that the writ of *mandamus* itself was not valid in law; and if the court adjudged that the writ was valid, but the return invalid, it was to proceed to award a peremptory *mandamus;* and also, in any event, costs to be paid to the successful party (*s*); and under the present practice, the invalidity of the return in point of law must now be raised in the answer to the return as on the pleadings, and will be disposed of as a like question raised in a purely civil proceeding is disposed of (*t*).

Besides these provisions, we may notice an enactment of 1 & 2 Will. IV. c. 58, s. 8, whereby, in favour of officers and other persons to whom a writ of *mandamus* is directed to issue, commanding them to admit to offices, or to do or perform other matters in respect of which they claim no right or interest,—it is provided, that it shall be lawful for the court, to which application is made for the writ, to relieve them from the liabilities incident to the execution thereof, by calling upon any other person having or claiming any interest in the matter to appear and show cause against the issuing of the writ; and thereupon the court may make such rules and orders between all parties as the circumstances of the case may require; and this provision has been adopted by the Judicature Acts (*u*).

283; R. *v.* Governors of Darlington School, 6 Q. B. 682; The Queen *v.* Ambergate Railway Company, 17 Q. B. 957; The Queen *v.* Ingham, 17 Q. B. 884.

(*s*) The provisions of the Common Law Procedure Acts, 1852 and 1854, were applied (so far as they were applicable) to the proceedings and pleadings upon a prerogative writ of *mandamus* (17 & 18 Vict. c. 125, s. 77; and see Crown Office Rules (1886), rr. 77, 78).

(*t*) Crown Office Rules (1886), r. 70.

(*u*) Ibid. r. 73.

2. Secondly, as regards the *Mandamus incidental to an Action or other Proceeding*.—This was first introduced into the general practice of the courts by the Common Law Procedure Act, 1854,—which provided that the plaintiff in any action, (except replevin and ejectment,) might indorse upon his writ of summons a notice that he intended to claim a writ of *mandamus*, commanding the defendant to perform some duty in which the plaintiff was interested, and to enforce which there was no other remedy (*x*); and that the plaintiff might accordingly make such claim afterwards in the pleadings,—either together with any other demand, or separately,—setting forth in his statement the grounds of his claim, and that performance of the duty had been demanded, and that it had been neglected or refused. Thereupon, if judgment was given in the action, that a *mandamus* should issue, the Act proceeded to direct, that a peremptory writ of *mandamus*, (in addition to the ordinary execution proper to the action,) should issue out of the court in which the action was brought, commanding the defendant forthwith to perform the duty; and in case of disobedience, he might be attached; or the court might, on the application of the plaintiff, direct the act to be done by the plaintiff, (or by some person appointed for the purpose by the court,) at the expense of the defendant; and when the act required by the judgment of the court to be done is the execution of any conveyance, contract, or other document, or the indorsement of any negotiable instrument, the Judicature Act, 1884 (*y*), s. 14, has adopted this alternative provision.

It is apparently chiefly with reference to a *mandamus* of the species now under consideration—that is to say, when

(*x*) 17 & 18 Vict. c. 125, ss. 68—76. Benson *v.* Paull, 6 Ell. & Bl. 373; Ward *v.* Lowndes, 1 E. & E. 940; Bush *v.* Beavan, 1 Hurls. & C. 500; Ord. liii. r. 1; Reg. *v.* Lambourne Valley, 22 Q. B. D. 463; Reg. *v.* L. & N. W. Rail. Co., (1894) 2 Q. B. 512.

(*y*) 47 & 48 Vict. c. 61, s. 14; Re Edwards, 33 W. R. 578; Howarth *v.* Howarth, 11 P. Div. 78.

the mandamus is applied for in some cause or matter already pending before the court—that the following provision was inserted in the Judicature Acts, viz., that a *mandamus* may be granted, by an *interlocutory* order of the court, in all cases in which it shall appear to the court to be just or convenient that such order should be made; and that any such order may be made, either unconditionally, or upon such terms and conditions as the court shall think just (*z*). And it has now been provided (*a*), that no *writ* of *mandamus* shall, in such a case, hereafter be issued, but the order itself commanding the defendant to do the act shall have the same effect as the old *writ* of *mandamus;* and that the court may (for good cause) extend the time for the defendant's compliance with the order.

VII. *The Writ of Prohibition.*—This writ is [directed to the judge and parties to a suit in any inferior court, commanding them to cease from the prosecution thereof, —upon a surmise, either that the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court (*b*). The writ may issue to any species of inferior court, if it concerns itself with some matter not within its jurisdiction (*c*); or if, in handling matters clearly within its cognizance, it transgresses the bounds prescribed to it by the laws of England (*d*),—as where a spiritual court

(*z*) 36 & 37 Vict. c. 66, s. 25, sub-s. (8); Ord. l. r. 6; In re Paris Skating Rink Company, 6 Ch. D. 731.

(*a*) Ord. liii. rr. 3, 4.

(*b*) Tucker *v.* Tucker, 4 Man. & Gr. 1074; Re Dean of York, 7 Q. B. 1.

(*c*) 3 Bl. Com. p. 112; Hunt *v.* The South Staffordshire Railway Company, 2 Hurl. & N. 451; Jones *v.* Slee, 32 Ch. Div. 585; Reg. *v.* Lincolnshire County Court Judge, 20 Q. B. Div. 167.

(*d*) If sentence has been given in the court below, the superior court will presume that there was no excess of jurisdiction; unless such excess be distinctly proved, or be apparent on the face of the proceedings (Hart *v.* Marsh, 5 Ad. & Ell. 591; Broad *v.* Perkins, 21 Q. B. D. 533).

[requires two witnesses to prove a release or payment of tithes (*e*), or the like (*f*): for as the fact of signing a release, or of actual payment, is not properly a spiritual question, but only allowed to be decided in such courts because incident or accessory to some original question clearly within their jurisdiction, it ought therefore, where the two laws differ, to be decided not according to the spiritual, but according to the temporal, law; else the same question might be determined in different ways, according to the court in which the suit is depending,—an impropriety which no wise government can or ought to endure, and which is therefore a ground of prohibition (*g*).]

The method of proceeding in prohibition is as follows (*h*):—The party aggrieved in the court below applies to the High Court, setting forth the nature and cause of his complaint, in being drawn *ad aliud examen*, by a jurisdiction or manner of process disallowed by the laws of the kingdom. And this used formerly to be done by filing, as of record, a *suggestion*, containing a formal statement of the facts; but by 1 Will. IV. c. 21, it has been provided, that it shall not be necessary to file any suggestion, but that an application for a prohibition may be made on *affidavits* only, as on an ordinary motion; upon which, if the matter alleged appear to the court to be sufficient, the prohibition immediately issues, commanding the judge not to hold, and the party not to prosecute, the plea. But sometimes the point may be too nice and doubtful to be

(*e*) Mallary *v.* Marriott, Cro. Eliz. 667; Hob. 188.

(*f*) A prohibition will not be awarded in respect of a mere point of *practice* (Ex parte Smyth, 1 Tyr. & G. 227; Jolly *v.* Baines, 12 Ad. & El. 201; Ex parte Story, 12 C. B. 767); nor at the instance of a *stranger* to the suit. (The Queen *v.* Twiss, Law Rep., 4 Q. B. 407.)

(*g*) 3 Bl. Com. p. 112.

(*h*) No mention is made in the Judicature Acts of a prohibition; except that, in Ord. liv. r. 12, it is mentioned as one of the matters which cannot be dealt with at chambers by a *master* in place of a judge; and except that, by Ord. lxviii. rr. 2—4, the practice in an ordinary civil proceeding is, to the specified extent, made applicable to prohibition; and see Crown Office Rules, 1886, rr. 81, 82.

decided merely upon a motion; and then, for the more solemn determination of the question, the party applying for the prohibition may be directed by the court to deliver a statement (formerly called the declaration in prohibition), setting forth, in a concise manner, so much of the proceeding in the court below as may be necessary to show the ground of the application, and praying that a prohibition may issue (*i*); and to the above statement, the defendant might have demurred, or raised such other defence as was proper to show that the writ ought not to issue; and in case a verdict on an issue of fact raised on such statement was given for the plaintiff, the jury assessed damages (*k*). Consequently, the effect of the provisions of 1 Will. IV. c. 21, was to place prohibitions (unless disposed of, as was more generally the case, on the motion itself) substantially upon the footing of an action; and it has been expressly provided, by the Judicature Acts (*l*), that the particular provisions therein specified shall apply to proceedings in prohibition equally as to purely civil proceedings; and that when pleadings are ordered, they and all subsequent proceedings therein shall, as nearly as may be, correspond with the pleadings and subsequent proceedings in an ordinary action. After a rule for a prohibition has been made absolute, if either the judge of the court below, or any party to the cause or proceeding pending therein, shall proceed in disobedience to it, an attachment may be had against him to punish him for the contempt; and an action for damages will also lie at the suit of the injured party (*m*).

(*i*) 1 Will. 4, c. 21, s. 1; Remington *v.* Dolby, 9 Q. B. 176; Worthington *v.* Jeffries, Law Rep., 10 C. B., *per cur.*, p. 386. With regard, however, to applications for a prohibition to a *county court* (which are usually made at chambers), it has been provided, by 51 & 52 Vict. c. 43, s. 128, re-enacting the like provision in 19 & 20 Vict. c. 108, s. 42, that the matter shall be finally disposed of by the rule or order, without any declaration in prohibition.

(*k*) White *v.* Steele, 13 C. B. 231.

(*l*) Ord. lxviii.; see rr. 2—4.

(*m*) F. N. B. 40; 2 Inst. 601—618.

VIII. *Information in the nature of a Quo Warranto.*—The writ of *quo warranto* was in the nature of a writ of right for the crown, against him who claimed or usurped any office, franchise, or liberty,—to inquire, in order to determine the right, by what authority he supported his claim (*n*). It lay also in case of non-user or long neglect of a franchise, or mis-user or abuser of it,—commanding the defendant to show by what warrant he exercised the franchise, having never had any grant of it, or else having forfeited it by neglect or abuse. The writ of *quo warranto* was originally returnable before [the king's justices at Westminster (*o*); but afterwards, by virtue of the statutes of *quo warranto* (6 Edw. I. c. 1, and 18 Edw. I. st. 2), only before the justices in eyre. But after those justices gave place to temporary commissioners of assize,—the judges on the several circuits,—this branch of those statutes lost its effect; and writs of *quo warranto* were then (as before) prosecuted and determined before the king's justices at Westminster. And in case of judgment for the defendant, he had an allowance of his franchise; but in case of judgment for the crown,—for that the party was entitled to no such franchise, or had disused or abused it,—the franchise was either seized into the sovereign's hands, to be granted out again to whomsoever the sovereign should please; or, if it were not such a franchise as might subsist in the hands of the crown, there was merely judgment of *ouster*, to turn out the party who usurped it (*p*). The judgment in *quo warranto* was final and conclusive, even against the crown: and this, together with the length of its process, probably occasioned that disuse into which it gradually fell: and introduced the modern method of proceeding in similar cases, *i.e.*, by information, filed by the attorney-general, *in the nature* of a writ of *quo warranto*,—wherein the process is speedier, and the judg-

(*n*) Finch, L. 322; 2 Inst. 282.

(*o*) Old Nat. Brev. fol. 107, edit. 1534.

(*p*) 2 Inst. 498; Rast. Entr. 540; R. *v.* Stanton, Cro. Jac. 259; R. *v.* Mayor of London, 1 Show. 280.

[ment not quite so decisive (*q*); and which information is properly a *criminal* proceeding, to punish the usurper by a fine for the usurpation of the franchise, as well as to oust him or seize it for the crown (*r*). But this information hath long been applied to the mere purpose of trying the civil right,—seizing the franchise, or ousting the wrongful possessor, the fine being nominal only (*s*); and it is therefore, now, considered as merely a *civil* proceeding (*t*), and in which therefore a new trial may be had, although the verdict should have been for the defendant (*u*). And,

(*q*) Under the Judicature Acts, such informations (which formerly were always filed in the Court of Queen's Bench) belong exclusively to the Queen's Bench Division (36 & 37 Vict. c. 66, s. 34; Ord. lxviii. r. 2.)

(*r*) During the violent proceedings that took place towards the end of the reign of King Charles the second, it was (among other things) thought expedient to new-model most of the corporations in the kingdom; for which purpose, many of those bodies were persuaded to surrender their charters; and informations in the nature of *quo warranto* were brought against others,—as upon a forfeiture of their franchises by neglect or abuser of them; and the consequence was, that the liberties of most of them were seized into the hands of the king, who granted them fresh charters, with such alterations as were thought expedient; and, during their state of anarchy, the crown named all their magistrates. But this exertion of power, though strictly legal, caused great alarm; and it was thought necessary, at the Revolution, to bridle this branch of the prerogative, at least so far as regards the metropolis; wherefore the statute 2 W. & M. c. 8 declared, that the franchises of the city of London should never thereafter be seized for any forfeiture or misdemeanor whatsoever (3 Bl. Com. pp. 263, 264).

(*s*) An information in *quo warranto* to try the title to an office which has determined, will not be granted (Re Harris, 6 Ad. & El. 475); nor will that process be granted for a mere irregularity in an election not affecting the result (The Queen *v.* Ward, Law Rep., 8 Q. B. 210). Nor does this remedy lie in respect of the office of guardian to a poor law union (Re Aston Union, 6 Ad. & El. 784); or in respect of the office of clerk to the justices of a borough (The Queen *v.* Fox, 8 Ell. & Bl. 939); but it lies in respect of the office of clerk to a statutory board of guardians (The Queen *v.* St. Martin's-in-the-Fields, 17 Q. B. 149).

(*t*) 4 Bl. Com. 312.

(*u*) R. *v.* Francis, 2 T. R. 484. The Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), did not apply to an information in *quo warranto* (Reg. *v.* Seale, 5 Ell. & Bl. 1); but Ord. lxviii. r. 2,

[under the provisions of 9 Ann. c. 25, this proceeding is now available as between party and party, and without any intervention of the prerogative; for that statute permits an information, in the nature of a *quo warranto*, to be brought (with leave of the court) (*x*), at the relation of any person desiring to prosecute the same,—who is then styled the *relator* (*y*),—against any person usurping, intruding into, or unlawfully holding a franchise, or office, in any city, borough, or town corporate (*z*); and the same Act provides also for the speedy determination of such information; and directs that if the defendant be convicted, judgment of ouster, (as well as a fine,) may be given against him; and that the relator shall pay, or shall receive, costs, according to the event of the suit (*a*).]

And as regards such civil proceeding in *quo warranto*, it has been provided, by the 32 Geo. III. c. 58, that the defendant may state, by way of defence to an information in the nature of a *quo warranto* in respect of any office in a town corporate, (whether exhibited by leave of the court, or by the attorney-general on behalf of the crown,) that he first took upon himself such office, six years or more before the information was exhibited; and such defence may be pleaded with any other that the court may allow; and may be met by a reply, that a forfeiture of such office had happened within such period of limitation; and the title of the defendant, derived under any election, is not to be affected by defect of title in the person electing,—providing the elector has been in the exercise *de facto* of his

applies the procedure in purely civil actions to proceedings in *quo warranto*, so far as regards affidavits, motions, appeals, and the like.

(*x*) R. *v.* Parry, 6 A. & E. 810.

(*y*) The relator must swear an affidavit, to the effect that he is relator (Crown Office Rules, 1886, r. 54; R. *v.* Hedges, 11 Ad. & El. 163; R. *v.* Anderson, 2 Q. B. 740; R. *v.* Greene, 2 Q. B. 460).

(*z*) An information in *quo warranto* cannot be brought against persons assuming to act as a corporation, unless at the instance of the attorney-general. (R. *v.* White, 5 Ad. & El. 613.)

(*a*) Lloyd *v.* The Queen, 2 B. & Smith, 656; Ord. lxviii. r. 2.

office six years previous to the information. And, by the statutes 7 Will. IV. & 1 Vict. c. 78, 6 & 7 Vict. c. 89, and 45 & 46 Vict. c. 50, it has been provided, as regards municipal corporations, that every application for the purpose of calling upon a person to show by what warrant he claims to exercise the office of mayor, alderman, or burgess, in any borough within the Municipal Corporations Act, must be made before the end of twelve months after the election of the defendant, or the time when he shall become disqualified; and that no election of a mayor shall be liable to be questioned by reason of a defect in his title to the office of alderman or councillor to which he may have been previously elected, unless, within twelve months after his election, a rule shall have been applied for, calling upon him to show cause by what warrant he claimed to exercise such office; and that every election to the office of mayor, alderman, councillor, or other corporate office, within any such borough, which shall not have been called in question within twelve months after such election, shall be deemed good and valid.

IX. *The Writ of Habeas Corpus.*—This is the most celebrated writ in the English law, being the great prerogative remedy which the law has provided against violations of the right of personal liberty; and though we have had occasion, in other parts of this work, to make some remarks upon *habeas corpus*,—still, a more particular detail of its history, and of the practice connected with it, may here be acceptable (*b*).

(*b*) Blackstone notices (vol. iii. p. 128) three other writs (all of them now obsolete), for removing the injury of false imprisonment:—1st, The writ of *mainprize* (*manucaptio*), commanding the sheriff to take sureties (usually called *mainpernors*), for the appearance of the prisoner and to set him at large; 2nd, The writ *de odio et atiâ*, commanding the sheriff to inquire, whether a prisoner charged with murder was committed on general cause of suspicion, or merely *propter odium et atiam*, for hatred and ill-will,—with the view (if the latter was found to be the case) of afterwards issuing another writ to admit

The most important kind of *habeas corpus* (and the only one to which the attention of the reader is here specially invited) is that of *habeas corpus ad subjiciendum*,—being the remedy used for the deliverance from illegal confinement (*c*). The writ is directed to any person who detains another in custody; and commands him to produce the body, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum*,—to do, submit to, and receive whatsover the judge or court awarding such writ shall consider right in that behalf (*d*). This is a high prerogative writ, which existed at common law, though it has been improved, as we shall presently see, by statute (*e*); and it runs generally into all parts of the dominions of the crown, wherever situate; but it has been provided,

him to bail; and 3rdly, The writ *de homine replegiando*, commanding the sheriff to replevy a man out of custody in the same manner that chattels taken in distress may be replevied, upon security given that the prisoner shall answer any charge against him.

(*c*) The other kinds of the writ of *habeas corpus* mentioned in the books, are:—1. The *habeas corpus ad respondendum*, to bring up a prisoner confined by the process of an inferior court, to charge him with a fresh action in the court above; 2. *Ad satisfaciendum*, with a similar object when *judgment* in the inferior court has been had against the prisoner; 3. *Ad faciendum et recipiendum* (otherwise called a *habeas corpus cum causâ*),—when, in an action in the inferior court, the defendant has been arrested,—to remove the proceedings and bring up the body of the defendant to the court above, to "do and receive what the king's court shall deliver in that behalf;" and 4. *Ad prosequendum, testificandum, deliberandum*, &c., when a prisoner has to be brought up to bear testimony in any court, or to be tried in the proper jurisdiction. But with regard to the last, the occasions for its use have been diminished by 16 & 17 Vict. c. 30, s. 9, and 19 & 20 Vict. c. 108, s. 31, allowing prisoners to be brought up as witnesses, without a *habeas*, by order of the judge or of a secretary of state; and by 30 & 31 Vict. c. 35, s. 10, making an analogous provision with regard to the removal of prisoners from gaol in order to take their trial.

(*d*) State Trials, viii. 142; R. *v.* Batcheldor, 1 Per. & D. 516; S. C., nom. Leonard Watson's case, 9 Ad. & El. 731; In re Parker, 5 Mee. & W. 32; Carus Wilson's case, 7 Q. B. 984; The Queen *v.* Brenan, 16 L. J. Q. B. 289; In re Dunn, 17 L. J. Q. B. 97; Re Andrews, 4 C. B. 226.

(*e*) Bl. Com. vol. iii. p. 137.

by 25 & 26 Vict. c. 20, that no writ of *habeas corpus* shall issue out of England, by authority of any judge or court therein, into any colony or foreign dominion of the crown, wherein her Majesty has a lawfully established court with authority to grant and issue such writ, and with power to ensure its due execution throughout such colony or dominion (*f*). The writ will only issue on application made, supported by affidavit of the facts, and after a rule or order made thereon (*g*); [for, as was argued by Lord Chief Justice Vaughan, "it is granted on motion, because it cannot be had of course; and therefore there is no *necessity* to grant it, for the court ought to be satisfied that the party hath a probable cause to be delivered" (*h*). And this seems the more reasonable; because, when once granted, the person to whom it is directed can return no satisfactory excuse for not bringing up the body of the prisoner (*i*);] so that if it issued of mere course, without showing to the court or judge some reasonable ground for awarding it, a traitor, a felon, or a dangerous lunatic might obtain a temporary enlargement by suing out a *habeas corpus*, though sure to be remanded as soon as brought up to the court: [and, indeed, Sir Edward Coke, when chief justice, did not scruple, in the thirteenth year of James the first, to deny a *habeas corpus* to one confined by the Court of Admiralty for piracy, there appearing, upon his own showing, sufficient grounds to confine him (*k*). On the other hand, if a probable ground be shown that the party is imprisoned without just cause, and therefore hath a right to be delivered, the writ is then a matter of right,—which may not be denied, but must be granted to every man that is committed, or detained in prison, or otherwise restrained, though it be by command of the king, or of his privy council, or any

(*f*) John Anderson's case, Jurist, vol. vii. pt. i. 122; Ex parte Brown, 2 Best & S. 280.

(*g*) Hobhouse's case, 3 B. & Ald. 420.

(*h*) Bushel's case, 2 Jon. 13.

(*i*) Bourn's case, Cro. Jac. 543.

(*k*) R. *v.* Marsh, 3 Bulstr. 27; White *v.* Wiltshire, 2 Roll. Rep. 138.

[other (*l*),—all which must, of course, be taken as being subject to any statutory provision, under which (as under the 54 & 55 Vict. c. 3) a discretion is vested in the court or judge before whom the application is made (*m*).

In a former part of these Commentaries, we expatiated at large on the personal liberty of the subject; and it was then shown, that this right of personal liberty is a natural inherent right; which cannot be surrendered or forfeited (unless for the commission of some crime); and which cannot be abridged (without the special permission of the law),—a doctrine coeval with the first rudiments of the English constitution, handed down to us from our Saxon ancestors, asserted after the Conquest and confirmed by the Conqueror himself and his descendants, and though sometimes a little impaired by the occasional despotism of princes, yet established on the firmest basis by the provisions of *Magna Charta*, and a long succession of statutes enacted under Edward the third. To assert an absolute exemption from imprisonment in all cases, is inconsistent with every idea of political society, and in the end would destroy civil liberty; but the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful; and it is this consideration which induces the absolute necessity of expressing, upon every commitment, the reason for which it is made, —in order that the court, upon a *habeas corpus*, may examine into its validity, and (according to the circumstances of the case) may discharge, admit to bail, or remand the prisoner.

And yet the court of king's bench, early in the reign of Charles the first, relying on some arbitrary precedents (and those, perhaps, misunderstood), determined that they could not, upon a *habeas corpus*, either bail or deliver a prisoner, though committed without any cause assigned, in a case

(*l*) 2 Inst. 615; Com. Journ. 1 Apr. 1628.

(*m*) Vide supra, vol. II. p. 298.

[where he was committed by the special command of the king, or by the lords of the privy council (*n*). This drew on a parliamentary inquiry, and produced the *Petition of Right*, in the third year of Charles the first, which recites this illegal judgment, and enacts that no freeman hereafter shall be so imprisoned or detained. But when, in the following year, Mr. Selden and others were committed by the lords of the council in pursuance of his majesty's special command, under a general charge of "notable contempts and stirring up sedition against the king and government," the judges delayed for two Terms (including also the long vacation) to deliver any opinion, how far such a charge was bailable; and they eventually annexed to the grant of bail the condition of finding sureties for good behaviour (*o*).

The difficulties thus allowed to impede the application of the writ, gave rise to the statute 16 Car. I. c. 10, s. 8; whereby it was enacted, that if any person was committed, though by the king himself in person, or by the privy council, or by any of the members thereof, he should have granted unto him, without any delay under any pretence whatsoever, a writ of *habeas corpus*,—upon demand or motion made to the king's bench or common pleas: who should thereupon, within three court days after the return was made, examine and determine the legality of such commitment, and do what to justice should appertain, in delivering, bailing, or remanding the prisoner. Yet still, in the case of Jenks, who in 1676 was committed by the king in council for a turbulent speech at the Guildhall, new

(*n*) State Trials, vii. 136.

(*o*) Blackstone remarks (vol. iii. p. 134), that Sir Nicholas Hyde, chief justice, also said on that occasion (see State Trials, vii. 240), that "if they were again remanded "for that cause, perhaps the court "would not afterwards grant a "*habeas corpus*, being already made "acquainted with the cause of the "imprisonment," — a statement which (it is said) was received with indignation and astonishment at the time; and Selden's own indignation at it (!) was not cooled at the distance of four and twenty years (Vindic. Mar. Claus. edit. A.D. 1653).

[impediments were permitted to delay the release of the prisoner (*p*),—the chief justice (as well as the chancellor) declining to award a writ of *habeas corpus ad subjiciendum* in vacation, though at last he thought proper to award the usual writs *ad deliberandum*, *&c.*, whereby the prisoner was discharged at the Old Bailey (*q*). Other abuses had also crept into daily practice, which had in some measure defeated the benefit of this great constitutional remedy; for the party imprisoning was at liberty to delay his obedience to the first writ; and might wait till a second and a third writ, called an *alias* and a *pluries*, were issued, before he produced the party; and many other vexatious shifts were practised, in order to detain state prisoners in custody; which abuses at length gave birth to the famous *Habeas Corpus* Act, 31 Car. II. c. 2, which is frequently considered as another *Magna Charta* of the kingdom (*r*).]

The statute enacts, 1. That, on complaint and request in writing by or on behalf of any person committed and charged with any *crime*, (unless for treason or felony expressed in the warrant; or unless it appear, that he is charged as accessory before the fact to some felony, or upon suspicion thereof, or with suspicion of felony, which felony is plainly expressed in the warrant; or unless he is in prison on process in any civil cause),—the lord chancellor or any of the judges in vacation, [upon viewing a copy of

(*p*) State Trials, vii. 471.

(*q*) Crowley's case, 2 Swanst. 1.

(*r*) Mr. Christian, in his edition of Blackstone, quotes from Burnet's Hist. Car. II. a circumstance respecting the passing of the *Habeas Corpus* Act, which is more curious than creditable: "It was carried," (says Burnet, vol. i. p. 485,) "by "an odd artifice in the House of "Lords. Lord Grey and Lord "Norris were named to be the "tellers; Lord Norris, being a "man subject to vapours, was not "at all times attentive to what he "was doing; so a very fat lord "coming in, Lord Grey counted "him for ten, as a jest at first; "but seeing Lord Norris had not "observed it, he went on with his "mis-reckoning of ten; so it was "reported to the House, and de-"clared that they who were for "the bill, were the majority; "though it indeed went on the "other side; and by this means "the bill past."

[the warrant, or affidavit that a copy is denied, shall (unless the party has neglected for two Terms to apply to any court for his enlargement) award a *habeas corpus* for such prisoner, returnable immediately before himself or any other of the judges; and, upon the return made, shall discharge the party, if bailable, upon his giving security to appear and answer to the accusation in the proper court of judicature. 2. That such writs shall be endorsed, as granted in pursuance of the Act, and signed by the person awarding them. 3. That the writ shall be returned, and the prisoner brought up, within a limited time according to the distance, not exceeding in any case twenty days. 4. That any officer or keeper, neglecting to make due return, or not delivering to the prisoner or his agent within six hours after demand a copy of the warrant of commitment, or shifting the custody of a prisoner from one officer to another, without sufficient reason or authority, (as specified in the Act,) shall for the first offence forfeit 100*l.*, and for the second offence 200*l.*, to the party grieved, and be disabled to hold his office (*s*). 5. That no person, once delivered by *habeas corpus*, shall be recommitted for the same offence, under a penalty of 500*l.* 6. That every person committed for treason or felony, shall, if he requires it, in open court upon the first week of the Term, or the first day of the session of *oyer* and *terminer* and general gaol delivery, be indicted in that same Term or session, or else admitted to bail,—unless, indeed, the witnesses for the crown cannot be produced at that time; and that if acquitted, or if not indicted and tried in the Term or session next following, he shall be discharged from his imprisonment for such imputed offence; but that no person, after the assizes shall be open for the county in which he is

(*s*) A person, sent over from Ireland under a warrant from the secretary of state for Ireland, charged with any offence, and committed to prison until he can be brought before a judge, is in general entitled to a copy of the warrant, under the *Habeas Corpus* Act, after it has been demanded. (Sedley *v.* Arbouin, 3 Esp. 174.)

[detained, shall be removed by *habeas corpus*, till after the assizes are ended, but shall be left to the justice of the judges of assize. 7. That if the lord chancellor or a judge shall deny the writ, on sight of a copy of the warrant of commitment, or upon oath made that such copy is refused, he shall forfeit to the party grieved the sum of 500*l*. And, 8. That this writ of *habeas corpus* shall run into the counties palatine, cinque ports, and other privileged places; and into the islands of Jersey and Guernsey (*t*).]

Such is the substance of this great and important statute, which extended (we may observe) only to the case of such commitments as can produce no inconvenience to public justice by a temporary enlargement of the prisoner, all other cases of unjust imprisonment being left, by that statute, to the remedy by *habeas corpus* as it existed at common law (*u*). But, at a later period, in order to render the common law writ more effectual in cases not within the operation of the Act of Charles the second, it was provided by 56 Geo. III. c. 100 :—1. That where any person shall be restrained of his liberty, (other than for some criminal or supposed criminal matter, and except persons imprisoned for debt, or by process in any civil suit,) any one of the judges may, upon *affidavit* showing a probable and reasonable ground for complaint, award the writ in time of vacation directed to the person in whose custody the party is confined,—the writ being made returnable immediately before himself, or any other judge. 2. That upon disobedience to the writ, the judge before whom it is returnable may issue a warrant to arrest the disobedient party, or party guilty in contempt. 3. That if the writ shall be awarded

(*t*) Carus Wilson's case, 7 Q. B. 984; The Queen *v.* Brenan, 16 L. J. Q. B. 289.

(*u*) "Even upon writs of *habeas* "*corpus* at the common law, it is "now expected by the court, "agreeable to antient precedents "and the spirit of the Act of Par- "liament, that the writ should "be *immediately* obeyed, without "waiting for any *alias* or *pluries;* "otherwise an attachment will "issue." (3 Bl. Com. p. 137; R. *v.* Cowle, 2 Burr. 586.)

so late in vacation that it cannot be conveniently obeyed during vacation, the same may be made returnable in court on a certain day in the next Term (or, now, Sittings). 4. That if such writ shall be awarded so late that it cannot be conveniently obeyed during the Term, the same may be made returnable in the then next vacation before any of the judges. 5. That though the return to the writ may be good in law, it shall be lawful for the judge before whom it is returnable, to proceed to examine into the truth of the facts; and if it appears doubtful to him whether they be true or not, it shall be lawful for him to let to bail the person so confined, upon his entering into a recognizance to appear in court in the Term (or Sittings) following, and the court may then proceed to examine into the truth of the facts in a summary way by *affidavit*, and may order and determine as to the discharge, bailing, or remanding of the party. 6. That the like proceeding for controverting the truth of the return may be had in the case where the writ shall be awarded by the court itself, or be returnable therein. 7. That the several provisions aforesaid shall extend to all writs of *habeas corpus* awarded in pursuance of the Act of the thirty-first year of Charles the second. And, 8. That a *habeas corpus*, issued under the Act of 56 Geo. III. c. 100, may run into any county palatine, or cinque port, or other privileged place; or into the islands of Jersey, Guernsey, and Man; or into any port, harbour, road, creek or bay, upon the coast of England or Wales, lying out of the body of any county (*x*).

[By which admirable regulations the remedy seems now to be complete for removing the injury of illegal confinement,—a remedy the more necessary because the oppression does not always arise from the ill-nature, but sometimes from the mere inattention, of government; for it frequently happens in foreign countries, (and has happened in England during the temporary suspension of

(*x*) Crown Office Rules (1886), rr. 235 to 249.

[the statute,) that persons apprehended upon suspicion have suffered a long imprisonment, merely because they were forgotten (*y*).]

X. *The Writ of Certiorari.*—This writ issues from the High Court of Justice to the judge or officers of any inferior court of record, commanding them to return the proceedings in an action or matter therein depending, to the end that the applicant may have the more sure and speedy justice (*z*). This writ may be had not only in *civil* but also in *criminal* cases; but the consideration of the writ of *certiorari* in its relation to criminal cases belongs more properly to the next Book of these Commentaries, where it will, accordingly, be found noticed (*a*): and our attention is at present called to the writ in its relation to civil cases only. And here, its object is to obtain relief from some inconvenience supposed, in the particular case, to arise from a cause being disposed of before an inferior jurisdiction, less capable than the High Court of rendering complete and effectual justice. The writ may be denied by statute (providing some simpler remedy) in particular cases; but where not so excluded, it may, in any civil proceeding, be applied for on a variety of grounds;—such, for example, as that difficult questions of law are likely to arise on the trial of the cause (*b*); or (where the action is to be tried before a jury) that no impartial jury can be obtained in the inferior court (*c*). But the writ will not issue as a matter of course; and with regard to proceedings in the *county courts*, it has been provided, by 51 & 52 Vict. c. 43, s. 126, re-enacting the like provisions contained in the repealed statutes, 9 & 10 Vict. c. 95, s. 90, and 19 & 20 Vict. c. 108, s. 38, that the writ of *certiorari* removing pro-

(*y*) 3 Bl. Com. p. 138.

(*z*) Bac. Abr. Certiorari A; Ex parte Phillips, 2 Ad. & El. 586.

(*a*) Vide post, vol. IV. bk. VI. chaps. X. and XV.

(*b*) Hunt *v.* Great Northern Railway Company, 2 L., M. & P. 268.

(*c*) Symonds *v.* Dimsdale, 2 Exch. 523.

ceedings therefrom shall only issue if the High Court or a judge thereof shall deem it desirable that the cause shall be tried in the superior court; and the applicant must give such security, for the amount of the claim and the costs of the trial, not exceeding in all 100*l.*, and shall assent to such further terms, if any, as it shall be thought fit to impose (*d*). And with regard to the other inferior courts, there are divers statutes which restrain the removal of frivolous cases for the purpose of vexatious delay; *e.g.*, by 21 Jac. I. c. 23, it was enacted, that where the judge of an inferior court of record was a barrister of three years' standing, no cause (except as therein excepted) should be removed thence by any writ after issue joined; and by 19 Geo. III. c. 70, s. 6 (as extended by 7 & 8 Geo. IV. c. 71, s. 6), no cause under the value of 20*l.* could be removed, unless the defendant gave security for payment of the debt and costs; and the schedule annexed to the Borough and Local Courts of Record Act, 1872 (which schedule may be applied by order in council to any local court of record), contains an express provision, that no action shall be removed thence before judgment, except by leave of a judge, and on such terms as he shall think fit (*e*).

(*d*) The repealed Acts specified the limit of 5*l.* for the claim, and the limit of 100*l.* for the security.

(*e*) 35 & 36 Vict. c. 86, sched. r. 12.

CHAPTER XIII.

OF PROCEEDINGS IN THE CHANCERY DIVISION.

THE account above given of the proceedings in an action has been confined to an action in the Queen's Bench Division of the High Court,—such action best exemplifying the regular proceedings in an action; and we shall now proceed to consider an action in the Chancery Division. And firstly, it is to be understood, that proceedings in the Chancery Division, other than those which are by way of petition or summons (*a*), are by *action* commencing with the ordinary writ; and that no variation takes place in the process subsequent to the issue of such writ, with regard either to the service thereof upon the defendant, or with regard to the appearance of the defendant; but with respect to the parties, and to the indorsements on the writ, the pleadings, the mode of trial, the manner of taking evidence, and the judgment in the action itself (or the *decree*, as the judgment was commonly called in this Division), there are a variety of special regulations laid down in the Orders, or in such parts of the former practice of the Court of Chancery as are still retained,—such special regu-

(*a*) The jurisdiction at chambers on *summons* has been very largely increased, under the provisions of Ord. lv., by which a *summons* has been substituted for a petition in a great many cases specified in that order (with a view to the saving of expense); and a summons (called an *originating summons*) has, in a large number of cases, taken the place of a writ of summons (with a view to celerity in obtaining the decision of the court).

lations being rendered in most cases necessary by reason of the nature of the injuries redressible, and of the appropriate relief to be given therefor, in this Division. And accordingly, in the remainder of this chapter, we shall point out shortly the nature of these variations—it being understood that, in other matters, the course of an action in the Chancery Division, is pursued in the same manner as in the Queen's Bench Division.

I. Firstly, with regard to the *Process* (*b*).—It will be remembered, that, in every action, the writ of summons must be assigned by the plaintiff to such Division as he may select; and should this be the Chancery Division, he must, in addition, procure the cause to be assigned to one of the judges thereof, by having the writ marked with his name,—subject to the power of transfer contained in the Acts, and subject also to the power of the Lord Chancellor, by order from time to time, otherwise to direct (*c*). And as to the indorsements of claim required on every writ of summons (*d*), these, in the case of an action in the Chancery Division, differ in accordance with the almost infinite variety of the equitable relief that may be sought, the examples given in the Appendix to the Orders themselves illustrating their nature, and the specimens there given including claims as creditor, or as legatee (or as the case may be), to have the estate of one who is deceased administered; or to have the accounts of certain partnership, or mortgage, transactions taken; or that certain trusts may be carried into execution; or that a certain deed may be set aside or rectified; or for the specific performance of a certain agreement and the like;—all of which claims are to be indorsed, concisely, on the writ (*e*). And it is specially provided, that in all cases of ordinary account —as, for instance, in the case of a partnership, executor-

(*b*) Vide sup. p. 532.
(*c*) Ord. v. rr. 5, 9; Ord. xlix.
(*d*) Ord. iii. r. 3.
(*e*) See examples given in App. A. part iii. sect. i.; also, App. L.

ship, or ordinary trust account,—where the plaintiff, in the first instance, desires to have an account taken, the writ of summons shall be expressly indorsed with a claim that such account be taken (*f*).

The rules with regard to the parties in ordinary actions, and the mode (formerly explained) of setting right mistakes or omissions which may be made therein, apply also to the Chancery Division; but the nature of the business dealt with in that Division requires, that those rules should be supplemented by the provisions, as to parties, which are contained in the 15 & 16 Vict. c. 86, s. 42; and these have in fact been expressly applied to the Chancery Division, by a series of rules made in 1883 (*g*). It would carry us beyond our limits, if we were to attempt to set forth all the rules as to the proper parties in actions in the Chancery Division; but it may be noticed here, that though, in a variety of cases, one of several persons interested with others in an estate (as, for example, one of several residuary legatees or devisees, or one of several *cestuis que trust*) may obtain an administration decree without serving the rest; and though, in all cases of suits for the protection of property, one person may, in general, sue on behalf of himself and of all others having the same interest,—yet that the court may require any other persons to be made parties, and may give the conduct of the suit to such person as it may deem proper (*h*).

II. With regard to the *Pleadings* (*i*).—No special regulations for the Chancery Division exist with regard to these; but it is obvious that the statement of claim, and, indeed, the pleadings generally, must often, from the nature of the relief sought, be much more complicated and lengthy than those in an action in the Queen's Bench Division. The pleadings in an action for an assault or

(*f*) Ord. iii. r. 8; Ord. xxxiii. rr. 2—9.

(*g*) Ord. xvi. rr. 8, 9, 32—47.

(*h*) 15 & 16 Vict. c. 86, s. 42; Ord. xvi. r. 39.

(*i*) Vide sup. p. 543.

trespass, for instance, or on an account stated, are as a rule short and simple enough; but in actions brought in the Chancery Division, it seldom happens that the case on either side admits of such compendious exposition, although sometimes that is the case; and for the better illustration of our immediate subject, we will take as an example an action of foreclosure in its simplest form—that action being one of the most frequent occurrence in the Chancery Division. An action, then, of foreclosure being brought by A. against B., the statement of claim commences by shortly stating the mortgage under which A. claims, the amount which it was given to secure, and the rate of interest; the title of A. is then shown in case the mortgage was not made directly to him; and the title of B. (as known to A.) is stated, in case the mortgage was not made by B.; and, after alleging the sum lent to be still due with arrears of interest, the statement of claim proceeds to claim, that an account may be taken of what is due on such security to the plaintiff, and that the defendant may be decreed to pay the same, on a certain day to be appointed by the court, to the plaintiff, together with his costs of action—the plaintiff on his side offering, on being so paid, to convey the premises, as the court shall direct; and further claiming that, in default, the defendant may be *foreclosed* of his equity of redemption. To this statement of claim the defendant usually has no defence,—in which case, the pleadings are at an end forthwith; sometimes, however, the defendant may, in his statement of defence, state:—1. That the contents of the mortgage deed are not correctly stated in the statement of claim, with an allegation that the sum advanced was less than that stated in the claim; and that the rate of interest was also lower; or 2. That he has, before action brought, repaid the sum due on the mortgage, together with all arrears of interest due thereon; on which defence the plaintiff in his reply would join issue, and the pleadings would close. So, in an action for *specific performance*, the statement of claim

alleges that the defendant agreed to grant a lease to the plaintiff and has refused to do so; and the defendant states as his defence that the plaintiff, having been let into possession, has broken one of the covenants of the proposed lease; to which the plaintiff may reply that he never in fact broke the covenant as alleged; and that if he did, such breach was waived by the defendant; and under the present rules of pleading, the plaintiff, in the circumstances imagined, would not be required to anticipate the case of the defendant in his statement of claim (*k*).

III. With regard to the *Trial and Evidence* (*l*).—It is to be observed, that, as the general rule, the party giving notice of trial in an action in the Chancery Division will prefer the matter to be disposed of by the judge himself without a jury; the former courts of equity seldom in fact resorted to the aid of a jury to decide disputed matters of fact; and at one time, the only mode in which they were enabled to do so, where it was desirable, was by what was called a *feigned issue*,—that is to say, by raising the points to be decided, by means of fictitious pleadings arranged between the parties, in the same form as if an action at law had been brought on a *wager* involving the fact in dispute, and then leaving the issue thus raised to be tried by a jury at *nisi prius*. Afterwards, (by 8 & 9 Vict. c. 109, s. 19,) these courts were enabled to obtain the advice of a jury, by the simpler method of sending a particular fact or facts, arising in a cause before the court, to be so tried; and still later they were empowered to dispose of such matters themselves, by a jury summoned to attend them in their own courts (*m*); but a jury in the Court of Chancery has ever been an anomaly, and almost a fiction; for it was the practice to send issues of fact to the courts at Westminster, or to the assizes, for the determination thereof; and to refer ques-

(*k*) Hall *v.* Eve, Law Rep., 4 Ch. D. 341.

(*l*) Vide sup. p. 557.

(*m*) 21 & 22 Vict. c. 27, ss. 3—6.

tions of law, as distinct from equity, to one of the superior courts of common law for the opinion of such court,—the judges, after argument, certifying their opinion to the Lord Chancellor. Then, by 15 & 16 Vict. c. 86, s. 61, the practice of thus referring questions of law was prohibited, and power was given to the Court of Chancery to determine for itself any questions of law necessary to the decision of the equitable question at issue; and, under the Judicature Acts, the practice in this latter respect is scarcely altered; for, with regard to the decision of issues of *law*, the Chancery Division not only can (but must) decide these issues for itself; and with regard to the decision of issues of fact, the occasions which arise under the new system for the intervention of a jury in actions assigned to the Chancery Division, are not much more frequent in number than before; and indeed all actions in the Chancery Division which are of a nature exclusively appropriate to that Division are now to be tried by a judge without a jury (*n*),—unless the judge specifically orders a trial with a jury; and if he does so order the trial with a jury of an action, or of an issue of fact therein, such trial is not had in the Chancery Division itself, but before the Queen's Bench Division sitting in Middlesex, or at the assizes, according as the order of the court directs. For it has been provided, that, in any action pending in the Chancery Division, either the action, or any question at issue therein, may be ordered by the judge to be tried by a jury before any commissioner or commissioners of assize, or at the Middlesex sittings of the Queen's Bench Division; and although the order directing such trial must at one time have stated the reason for directing the action or issue to be so tried, that is not now necessary (*o*). And here it is to be observed, that the general rule regulating applications for

(*n*) Ord. xxxvi. r. 3; Swindell *v.* Birmingham Syndicate, 3 Ch. D. 127; Bach *v.* Hay, 5 Ch. D. 235; Cardinall *v.* Cardinall, 25 Ch. Div. 772.

(*o*) Ord. xxxvi. r. 1*a*; Warner *v.* Murdoch, 4 Ch. D. 750; Wood *v.* Hamblet, 6 Ch. D. 113.

new trials in the case of actions and issues (whereby they used to go to a divisional court where they have been tried with a jury, and to the Court of Appeal where they have been tried without a jury) was applicable to actions in the Chancery Division as well (*p*); but now, as we have seen, all such applications go to the Court of Appeal.

An important distinction is to be noticed with regard to the manner of giving evidence in an *action* in the Chancery Division, and in matters brought forward by way of *petition* to the court; for in the former, the evidence (in the absence of any written agreement between the parties) is given *vivâ voce*, as in actions pending in the Queen's Bench Division,—though subject to the power of the court to direct that particular facts shall be proved by affidavit, or to allow the evidence of particular witnesses to be taken before an examiner, and to dispense on proper grounds with their attendance at the hearing (*q*); but on any motion, petition, or summons, the evidence may be (and must be) given by *affidavit* (subject to an order of the court on the application of either party for the cross-examination of the deponent); and this rule applies not only to such interlocutory applications as are made in an action, but also to that large class of miscellaneous matters which are referred by statute to this Division of the High Court, as representing the former Court of Chancery, under the arrangements of business mentioned elsewhere in this work (*r*).

IV. With regard to the *Judgment* (*s*).—It seems right here, pointedly to draw the attention of the student to the difference which will often be found between a Chancery

(*p*) Ord. xxxix. r. 1; Oastler *v.* Henderson, 2 Q. B. D. 575; Hunt *v.* City of London Real Property Company, 3 Q. B. D. 19; Jones *v.* Baxter, 5 Exch. D. 275; and disting. Davies *v.* Felix, 4 Exch. Div. 32.

(*q*) Ord. xxxvii. r. 1; Brooke *v.* Wigg, 8 Ch. D. 510.

(*r*) Vide sup. p. 495.

(*s*) Vide sup. p. 597.

judgment (or decree) and one in an action brought in a Common Law Division, wherein the judgment is usually brief and inelastic in its form, being simply that this or that chattel be given up, or that such and such land or money or costs be recovered; whereas if some equitable remedy or relief be sought in the Chancery Division, such final judgment must be had as will be adapted to the nature of the relief prayed,—which judgment being usually very long, the minutes thereof are taken down by the registrar, and are afterwards drawn up in the presence of the parties or their solicitors; and ultimately, if need should arise, are settled by the judge himself. And further, in the Chancery Division, before a judgment can be finally given, it frequently happens, that long accounts have to be settled, incumbrances and debts inquired into, and a hundred other facts cleared up (*t*),—the investigation of all which matters is usually conducted at chambers, before the chief clerks, or it may be referred to a referee (*u*); and in all these cases, the judge at the original hearing *adjourns the further consideration* of the action, until the accounts and inquiries directed to be gone into have been taken and made, and until the result thereof is reported to the court by the *chief clerk*, or by the referee; and the judgment is afterwards given by the court, on the basis of such report (called the *chief clerk's certificate* when made by the chief clerk, and called simply the *referee's report* when made by the referee), on the action being brought on for hearing on the further consideration (*x*).

V. With regard to *Execution* (*y*).—There were in use in the former Court of Chancery special methods to enforce the performance of an order or decree, by *attachment* of the person and by *sequestration* of the estate; and these writs (which are the usual process for contempt of court)

(*t*) 3 Bl. Com. 453.
(*u*) 36 & 37 Vict. c. 66, ss. 56, 57.
(*x*) See Ord. xxxvi. r. 21.
(*y*) Vide sup. p. 612.

are (in the Judicature Rules) enumerated among the methods by which judgments of the High Court of Justice may be enforced, and they are directed to have the same effect as previously in the Court of Chancery. They are not, however, usually applicable to an ordinary legal action,—wherein the judgment is only for the recovery of land or a specific chattel, or of money,—such latter judgments being appropriately enforced by one of the antient common law writs of execution, of which we spoke in a previous chapter (*z*); but these writs of attachment and sequestration are in use, in order to enforce those special orders or judgments which the Chancery Division has frequently occasion to give,—for example, when the order directs the payment of money into court by any person to the credit of an action pending; or when the judgment pronounced is for the recovery of some property withheld by the defendant, other than land or money (such, for instance, as title deeds or heirlooms); or when it requires anyone to do something other than to pay money (as to execute a certain deed); or to abstain from doing something (as the commission of waste),—all such orders or judgments being more frequent in such proceedings as take place in the Chancery Division, than in a legal action; but still the writs of attachment and sequestration are not confined in their operation to any particular class of action; but, should occasion arise, may, in proper cases, be resorted to, in whatever Division the action or proceeding is pending (*a*).

VI. With regard to the *Appeal*.—The practice of the Chancery Division presents no distinctive points to which the attention of the reader can be usefully drawn in such a treatise as the present.

(*z*) Vide sup. p. 617.

(*a*) 47 & 48 Vict. c. 61, s. 14; Ord. xlii. r. 30.

CHAPTER XIV.

OF PROCEEDINGS IN THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

In a former chapter, we showed that the Supreme Court of Judicature had been re-constituted out of the various courts previously existing, and that the Courts of Probate and for Divorce and Matrimonial Causes (both of modern creation), as well as the antient Court of Admiralty, were included in that re-constitution; and that, in addition to the Queen's Bench Division (constituted of the old Common Law Courts) and the Chancery Division (constituted of the old Courts of Chancery), there was also constituted a third Division, called the Probate Divorce and Admiralty Division (comprising the old courts of these respective names). The name of this third Division is unfortunate; because there is no natural connection whatever between an Admiralty action and the other matters assigned to this Division; and there is nothing in common between Probate business and Divorce business, except the circumstance that formerly they were both dealt with in the Ecclesiastical Courts; and it is necessary, therefore, that, in treating of the proceedings in this Division in its tripartite character, we should treat separately,—I. Of a Probate Action; II. Of a Divorce Petition; and III. Of an Admiralty Action,—it being understood that, unless where it is stated otherwise, the course of an action, and of the matters in-

cidental thereto, as already set forth, is the same in this Division also (*a*).

I. *Probate Action.*—The business relating to probate and administration, originally transacted in the Ecclesiastical Courts, and afterwards in the Court of Probate created by 20 & 21 Vict. c. 77, and subsequently transferred to the High Court of Justice, and assigned to the Probate Division, was twofold in its character—one being *non-contentious*, and the other *contentious*. Of the non-contentious business (otherwise termed the *common form business*) (*b*), and of the practice therein, we do not propose to take any specific notice, as it consists chiefly of matters of detail, which must be sought in the books of practice (*c*); but we may state generally, that it comprises the grant of probate or administration by the court, through the medium (in general) of the principal registry or the district registries, in respect of the personal property *in England* which belonged to anyone (whether a British subject or not) at the time of his or her death (*d*); and that (in cases in which the intervention of the court itself is required) the party to be affected by the order of the court is served with a *citation*, issuing from the High Court of Justice, and the object of which is, to compel a representation to be taken by those who are primarily entitled to it, or to provide a substitute upon a voluntary renunciation on their part; and with regard to such non-contentious or common form business, no change in the former practice has taken place since the Judicature Acts (*e*).

(*a*) Vide sup. chaps. XI. and XII. The practice in the Bankruptcy Division of the High Court has been already treated of, in bk. II. pt. II. c. VI. of this work.

(*b*) Common form or non-contentious business includes the *warning of caveats* entered against a grant of probate or administration. (20 & 21 Vict. c. 77, s. 2.)

(*c*) Coote's Common Form Practice, 8th ed.

(*d*) In the goods of Coode, Law Rep., 1 Prob. & Div. Ca. 449.

(*e*) Coote's Common Form Practice, p. 224; Peacock *v.* Lowe, Law Rep., 1 Prob. & Div. Ca. 311; and Kennaway *v.* Kennaway, 1 P. D. 14.

On *contentious business*, on the other hand, in which a probate *action* is brought in the High Court, the first proceeding therein is the same as in other actions, viz., a writ of summons; which, by its indorsement of claim, demands probate or administration (or the recall thereof); and the action proceeds, *mutatis mutandis*, through the various steps which we described in a preceding chapter (*f*),—though there are certain variations required by the nature of the relief sought for in a probate action (*g*),—such relief being of a limited and special character (*h*). But it is to be observed, that no writ of summons in a probate action is allowed to issue, unless preceded by an *affidavit* of the plaintiff in verification of the indorsement on the writ (*i*); and that such indorsement is required to state the character in which the plaintiff claims,—whether as creditor, executor, administrator, residuary legatee, legatee, next of kin, heir at law, devisee, or otherwise (*k*). The form of the claim is to the effect that a certain will be established or letters of administration granted, against which a caveat has been entered,—or as the circumstances of the case require (*l*); and it is provided, by the rules of pleading, that in a probate action, where the plaintiff disputes the interest of the defendant in the estate, he shall allege to that effect in his statement of claim (*m*). In order to obtain a general idea of the form which the pleadings assume in a probate action, we will suppose that the statement of claim sets forth the due making and execution of his last will by

(*f*) Vide sup. ch. xi.

(*g*) The previous Rules of the Probate Court (see in particular the Rules and Orders of 1862) are still in force, except where expressly varied (38 & 39 Vict. c. 77, s. 18); and they have been varied very slightly. (Probate Rules, Mar. 29, 1887.)

(*h*) See Ord. lxxi. r. 1, defining "probate actions" as including "actions and other matters relating to the grant or recall of probate or letters of administration, other than common form business."

(*i*) Ord. v. r. 15.

(*k*) Ord. iii. r. 5.

(*l*) See the specimens given in Appendix (A) (part iii. sect. 5), and Appendix (C) (sect. 3).

(*m*) Ord. xx. r. 9.

the testator (he being at the time of sound disposing power), and the due attestation of such will, whereby the plaintiff was appointed sole executor; and proceeds to claim that the court shall decree probate thereof in solemn form of law. And the defendant may be supposed to state, in his defence, that the deceased at the time he executed the will was not of sound disposing power, and that the will had been obtained by undue influence or fraud (stating the nature thereof); and the defendant may then set up an earlier will, whereby he himself was appointed executor And on these or similar defences issue may be joined; or the plaintiff may go on to allege, in his reply, that the earlier will set up was afterwards revoked (*n*). Or, again, the defendant in his defence may merely insist upon the will set up being proved in solemn form of law,—intimating to the plaintiff, that he only intends to cross-examine the witnesses produced in support of the will (*o*).

By leave of the court or a judge, the writ of summons may be served out of the jurisdiction (*p*); and anyone not named in the writ may *intervene* and appear in the action, on filing an affidavit showing how he is interested in the estate of the deceased (*q*). If the defendant makes default in pleading in a probate action, the action proceeds notwithstanding such default (*r*); and after trial before a judge without a jury, there may be either an application to the judge for a *rehearing*, as under the former Probate Court practice (*s*); or there may be an appeal to the Court of Appeal, on the facts as well as the law (*t*). Should the trial be with a jury, and the direction by the judge be objected to as bad in law,—then the matter is brought before the Court of Appeal by way of *exception* to such ruling (*u*),—but, in reality, like any ordinary appeal.

(*n*) Parton *v.* Johnson, Law Rep., 1 Prob. & Div. Ca. 549.
(*o*) Ord. xxi. r. 18.
(*p*) Ord. xi. r. 3.
(*q*) Ord. xii. r. 23.
(*r*) Ord. xxvii. r. 10.
(*s*) Probate Court Orders, 1862, r. 60.
(*t*) Sugden *v.* Lord St. Leonards, 1 P. D. 154.
(*u*) Cheese *v.* Lovejoy, 2 P. D. 161.

II. *Divorce Petition.*—The proceedings for a divorce are commenced by petition addressed to the president of the Division (*x*). None of the Rules and Orders issued under the Judicature Acts apply to such proceedings; or to proceedings for a judicial separation, or for a divorce; or to suits for nullity of marriage, or in respect of alimony; or to proceedings under the Legitimacy Declaration Act,—the practice in all these matters being the same as prevailed in the old Court for Divorce and Matrimonial Causes (*y*).

The petition is filed in court; and after concisely alleging the circumstances of the case, and in particular the alleged conduct on the part of the respondent or respondents which requires the interference of the court, proceeds to pray for the issue of a decree for a judicial separation or a divorce, or (on the part of a wife) for alimony,—or otherwise, as the circumstances of the case and the needs of the petitioner may require; and some of the grounds which will justify a petition to this court by husband and wife respectively, have been already stated, in another part of this work to which the reader is referred.

Every person praying a divorce or judicial separation, or a decree of nullity, or a decree in a suit of jactitation of marriage, must file with his petition an *affidavit* verifying the facts therein alleged, so far as they are within the petitioner's personal knowledge; and stating that there is no collusion or connivance between the deponent and the other party to the marriage (*z*). And on a petition for divorce presented by a husband, he must, unless excused by the court on special grounds, make the alleged adulterer a co-respondent (*a*). It is also required, by 20 & 21

(*x*) It is to be understood, that the practice is, in a general point of view, the same whether the petition be for a divorce, a judicial separation, or for nullity.

(*y*) 38 & 39 Vict. c. 77, s. 18, and Rules and Regulations, 26 Dec. 1865, 30 Jan. 1869; Ord. lxviii. r. 1; Harvey *v.* Lovekin, 10 P. D. 122.

(*z*) 20 & 21 Vict. c. 85, s. 41; Rules and Regulations, 1865, rr. 2, 3.

(*a*) Jinkings *v.* Jinkings, Law Rep., 1 Prob. & Div. Ca. 330; Jeffers *v.* Jeffers, 2 P. D. 90.

Vict. c. 85, s. 42, that every petition shall be served on the party to be affected thereby; and after such service, the next step is to issue a *citation*, which is in effect a writ of summons to the respondent or co-respondent,—though subject to the rules specially issued for proceedings in the Divorce Court, instead of those issued under the Judicature Acts.

The citation must be personally served, unless substitutional service be permitted or the service be dispensed with by the court,—as it will be should the circumstances of the case make it proper to do so (*b*); but the court will not take this course, unless the impossibility of effecting personal service is fully made out (*c*). And after having been served with the citation, the respondent or respondents must enter an appearance if they are desirous of taking any step in the cause; but a default in such entry will not preclude the hearing (by the court) of the evidence in support of the charges alleged in the petition, or the pronouncing sentence thereon.

Within the prescribed period after the service of the petition, the respondent must file in the registry his or her *answer;* and unless such answer simply denies the facts stated in the petition, this must be accompanied with an affidavit verifying the new matter alleged by the respondent; and in some classes of petition, and in particular petitions for divorce, or nullity, or judicial separation, the affidavit must also deny any collusion or connivance on the deponent's part (*d*). If the answer goes only to part of the matter charged, it should in its form confine itself to such part. To the answer succeeds a *replication;* which may consist of a simple denial by the petitioner of the matter alleged by the respondent; or it may plead some fact which will avoid the effect of such matter,—as, for example, if the defence set up be condonation of the adultery by the

(*b*) Re Sheehy, 1 P. D. 423.

(*c*) Appleyard *v.* Appleyard, Law Rep., 3 Prob. & Div. Ca. 257.

(*d*) Rules and Regulations, 1865, r. 31.

petitioner, the replication may both deny the condonation and allege that the adultery charged has been revived by some fact subsequent to the condonation (*e*). Beyond replication the pleadings seldom go; and instead of replying, the petitioner may demur to the answer as bad in law,—which demurrer will be argued before the judge on motion (*f*).

Where the attendance of the witnesses can be procured, they are examined *vivâ voce* in open court at the time the petition is heard; though in certain cases, and subject to the opportunity being given of cross-examination and re-examination of the deponent in open court, the case of either party may be verified by affidavit; and under certain circumstances, the evidence of any particular witness may be taken under a commission, and such evidence made admissible at the trial (*g*).

And with reference to the mode of trial, the judge will himself, on due application as soon as the pleadings are concluded, direct whether the action shall be tried by a jury or before the court itself, and whether by oral evidence or by affidavit (*h*); but in cases of *divorce*, the trial must be in open court, and not in *camerâ* (*i*); and either party may insist on a jury,—whose intervention, also, is necessary in all cases in which damages require to be assessed against the adulterer (*k*).

When an issue is to be tried either by a special or by a common jury, the record is settled by the registrar, and the case set down for trial by the petitioner; or in his default, this step may be taken by the respondent (*l*); and the trial takes place, in general, like the trial before a jury of an issue of fact in an ordinary action.

And with regard to *appeals*, the primary *appeal* from the

(*e*) Rules and Regulations, 1865, r. 32; Browning, p. 45.

(*f*) Burroughs *v.* Burroughs, Jurist, vol. vii. part i. 610.

(*g*) Rules and Regulations, 1865, rr. 51—55.

(*h*) Ibid. r. 40.

(*i*) Law Rep., 1 Prob. & Div. Ca. 640.

(*k*) 20 & 21 Vict. c. 85, ss. 28, 33.

(*l*) Rules and Regulations, 1865, r. 46.

decision of the judge ordinary (which used to be to the "full court" of judges as established by 20 & 21 Vict. c. 85, and 23 & 24 Vict. c. 144, and not to the Court of Appeal established under the Judicature Acts) (*m*), is now to the Court of Appeal, as in ordinary appeals (*n*),—there being, moreover, an ultimate appeal (in the case of a divorce suit, or for nullity of marriage) to the House of Lords (*o*). Also, any person wishing to show cause against making absolute a decree nisi for a divorce—which we may remember is always the form of the decree given on a petition for the dissolution of a marriage—may enter an appearance, together with an affidavit of the facts on which he relies; to which the party in whose favour the decree nisi was given may file affidavits in reply,—when the questions raised on such affidavits are argued before the judge; and if he shall so direct, any controverted question of fact arising thereon may be tried before a jury (*p*). But if, at the expiration of six calendar months, no person has appeared to oppose the decree, application may then be made to the judge to make such decree absolute (*q*); but if no application to make the decree absolute be made within a reasonable time, the respondent seems entitled to have the decree nisi revoked, and the petition dismissed for want of prosecution (*r*). Also, even during the progress of the cause, any person may give information to her Majesty's proctor of any matter material to the due decision of the case, who may thereupon take such steps as the attorney-general may think necessary or expedient; and such proctor may, under his direction and by leave of the court, *intervene* in the suit, entering an appearance himself to the petition, and pleading thereto collusion between the parties,—on

(*m*) Westhead *v.* Westhead, 2 P. D. 1; Gladstone *v.* Gladstone, ibid. 143.

(*n*) Judicature Act, 1881 (44 & 45 Vict. c. 68), s. 9.

(*o*) 20 & 21 Vict. c. 85, s. 56; 44 & 45 Vict. c. 68, s. 9.

(*p*) Rules and Regulations, 1865, rr. 70—76.

(*q*) Ibid. r. 80.

(*r*) Ousey *v.* Ousey, 2 P. D. 56.

which plea, an issue is raised and disposed of, as in other cases, between himself and the petitioner; and this course may be taken at any time before the decree has been made absolute (*s*).

III. *Admiralty Action.*—This action is regulated by the rules in force in the old Court of Admiralty, modified, however, by the rules laid down under the Judicature Acts with regard to actions generally, some of which apply, in particular, to admiralty actions *in rem* (*t*); and in an admiralty action *in personam*, the proceedings do not differ materially from the proceedings in an action in the Queen's Bench Division. As regards the action *in rem*, at any time after the writ of summons has issued, a warrant is also to issue therein, commanding the marshal of the court, or his substitutes—or the collector of customs at such and such a port—to *arrest* the ship in respect of which the claim is made,—or her cargo and freight,—and to keep the same until further order (*u*). The warrant, however, must be preceded by an *affidavit*, setting forth certain particulars prescribed by the Orders, and which vary according to the nature of the claim; but in all cases, such particulars disclose the nature of the claim, and the name and description of the party on whose behalf the action is instituted, and allege that the claim has not been satisfied (*x*). The defendant may cause a *caveat* to be entered against the arrest, —upon giving bail to the action (*y*).

In an admiralty action *in rem*, the service of the writ is effected by nailing or affixing the original writ on the mast of the vessel, or on the cargo, if removed from the ship,—which service is in lieu of the personal service required in other actions (*z*).

(*s*) 23 & 24 Vict. c. 144, s. 7; Le Sueur *v.* Le Sueur, 2 P. D. 79.

(*t*) The former rules of *pleading* in the Admiralty Court are wholly superseded (Ord. xix. r. 1).

(*u*) Ord. v. r. 16; App. A. part i. No. 17.

(*x*) Ord. v. r. 16.

(*y*) Rules, 1854, rr. 55—61.

(*z*) Ord. ix. rr. 11, 12.

If no appearance to the writ of summons was entered, then, in cases where no property was claimed in the *res*, and it had been arrested, it might be sold after notice and the proceeds brought into court; or if the property therein was claimed, the possession thereof might be decreed in the defendant's absence (*a*). On the other hand, if the defendant appeared, but failed to deliver *a statement of defence*, the plaintiff's course was to "deliver a conclusion," and to set down the action for hearing (*b*). But, under the present practice (*c*), in admiralty actions *in rem*, upon *default of appearance*, if when the action comes before him the judge is satisfied that the plaintiff's claim is well founded, he may pronounce for the claim, with or without a reference to the admiralty registrar,—or to such registrar assisted by merchants,—and may at the same time order the property to be appraised and sold,—with or without previous notice,—and the proceeds to be paid into court; or may make such other order as he shall think just; and *for default of pleading*, the practice appears to be as in an ordinary action (*d*).

Again, in an admiralty action *in rem*, any person not named in the writ of summons, may *intervene* and defend the action, on filing an affidavit showing either that he is interested in the *res* under arrest; or (should the arrest be taken off,—as it may be, on sufficient money being paid into the registry of the court to satisfy the claim and costs) that he is interested in the fund so paid in (*e*).

In the particular case of an action for "*damage by collision*" between vessels, the solicitors on either side are required to file in court a sealed up document called a *preliminary act*, before the delivery of any pleadings,—which preliminary act contains a statement as to certain facts with reference to the description of the vessels, and

(*a*) The Polymede, 1 P. D. 121.
(*b*) The Sfactoria, 2 P. D. 3; Rules, 1859, rr. 75, 80, 105.
(*c*) Ord. xiii. r. 13.
(*d*) Ord. xxvii. r. 11.
(*e*) Ord. xii. r. 24.

the circumstances of the collision,—and it may, with the consent of both parties, be opened, and the evidence taken thereon by order of the court or a judge, without the necessity of delivering any pleadings in the action (*f*). The object of this rule is to obtain a statement as soon as possible after the collision has taken place, so as to prevent either party from afterwards varying his version of the facts, in order to meet the allegations of his opponent (*g*).

In admiralty actions, whether *in rem* or *in personam*, the court or a judge, may, at any stage of the proceedings, on application by either party, call on the other to show cause why the trial should not take place, at some early day to be appointed; and for that purpose the court may dispense with notice of trial, and may otherwise vary the usual regulations as to bringing on an action for trial (*h*). The trial in admiralty actions is almost invariably before the judge alone, or before the judge sitting with two of the Trinity masters as assessors to advise him on questions of a nautical character,—though the decision given is that of the judge himself; and it is not usual to have recourse to a jury; but should one be desired, the matter would be under the control of the court in any case in which, as in an action *in rem*, the admiralty sub-division has an exclusive jurisdiction (*i*).

It may be further mentioned, that in an admiralty action tried before the judge, the court does not itself enter into matters of detail relating to the assessment of damages or matters of account, and that, whenever in the course of a trial it becomes necessary that the court should be informed upon such questions, it has always been usual to direct a reference to the registrar, assisted by merchants (*k*),—a practice which, however, must be now taken as subject, in the general case, to the power of the

(*f*) Ord. xix. r. 28; The Why Not, Law Rep., 2 Prob. & Div. Ca. 265; The Godiva, 11 P. D. 20.

(*g*) Williams & Bruce's Ad. Prac. p. 253.

(*h*) Ord. lxiv. r. 9.

(*i*) Ord. xxxvi. r. 4.

(*k*) Rules, 1859, rr. 107—118.

court to direct inquiries, and to make orders of a cognate nature, conferred by the Judicature Acts.

And, finally, with regard to the *appeal* in an admiralty action, that lies to the Court of Appeal, as in an ordinary action in the Chancery Division of the High Court; and there is an ultimate appeal to the House of Lords; or (*semble*) in certain cases, to the Privy Council; but where the judge ordinary has come to a conclusion of fact after hearing witnesses, his decision will not be reversed, except under very exceptional circumstances (*l*),—and the like rule, as we have abundantly seen (*m*), applies also to appeals in ordinary actions.

(*l*) The Glannibanta, 1 P. D. 283. (*m*) Vide supra, p. 603.

CHAPTER XV.

OF PROCEEDINGS AFFECTING THE CROWN.

We have, lastly, to speak of the manner of redressing civil injuries, in cases where the crown, either as the aggressor or as the sufferer, is concerned; and we shall consider, firstly, those injuries which a subject may suffer from the crown; and, secondly, those which the crown may sustain from a subject.

I. Although the sovereign can in his own person do no wrong, yet his acts may in themselves be contrary to law; and whenever it happens, that, by mis-information or inadvertence, the sovereign hath been induced to invade the private rights of any subject, and becomes (upon a due representation) informed of the injury sustained,—the law always then presumes, that to know of any injury and to redress it are inseparable in the royal breast; and issues, as of course, in the sovereign's own name, an order to his judges to do justice to the party aggrieved (*a*).

The distance between the sovereign and his subjects is such, that it rarely can happen that any injury to the *person* can proceed from the prince *to* any private man; and the law in decency supposes, that such injury never can or will happen at all; but injuries to a private individual's right of *property* may be committed by the crown, though scarcely without the intervention of its officers; and for

(*a*) 3 Bl. Com. p. 255.

these officers the law, in matters of right, entertains no respect or delicacy, but furnishes various methods of detecting their errors or misconduct (*b*). But inasmuch as, in ordinary cases, the sovereign himself is the medium through which justice is obtained, so no relief can be had against the crown,—by an ordinary action (*c*), but only by means of such special forms of proceeding as the law has provided in that behalf. This last observation does not, of course, apply where the rights of the crown (as in the case of a charity) are only incidentally concerned; for in such a case, the attorney-general, being made a party to the proceeding, sufficiently represents the crown,—and it is competent to the crown, even where its rights are substantially involved, to leave the protection thereof to the attorney-general (*d*).

[The method of obtaining possession or restitution from the crown, of either real or personal property (*e*), is by petition (*f*) of right (*petition de droit*). Which remedy is

(*b*) 3 Bl. Com. p. 255.

(*c*) Jenkins, 78; Finch, L. 83; Bac. Ab. Prerog. E. 7.

(*d*) Balch *v.* Wastall, 1 P. Wms. 445; Reeve *v.* Attorney-General, 1 Ves. 445; Simpson *v.* Clayton, 4 Bing. N. C. 766; 2 Roll. Abr. 213; Mitf. Treat. on Pleading in Chancery; Ord. xxxviii. r. 36.

(*e*) It is to be remarked, that neither an action for damages nor a petition of right lies, to recover compensation for a *tort* or wrongful act done by a servant of the crown in the supposed performance of his duties (Tobin *v.* The Queen, 16 C. B., N. S. 310); but it is otherwise for a breach of *contract*. (Thomas *v.* The Queen, Law Rep., 10 Q. B. 31; Kinloch *v.* Secretary of State for India, 7 App. Cas. 619; The Windsor (Canada) Rail. Co. *v.* The Queen, 11 App. Ca. 607.)

(*f*) The books speak also of another writ against the crown, termed a *monstrans de droit*, as the species applicable where the crown is in possession under a title the facts of which are already set forth on record; whereby the party aggrieved may put in, in opposition to such recorded title, a claim grounded on facts relied on by the claimant, without denying those relied upon by the crown. And Blackstone says (vol. iii. p. 256), that, by this writ, the process on which was speedier and cheaper than the process on *petition*, and which was enlarged and improved by 36 Edw. 3, c. 13, and 2 & 3 Edw. 6, c. 8, the petition of right became almost superseded. (See 4 Rep. 55; Bac. Ab. tit. Prerog. E. 7; Co. Entr. 402; Skin. 608.) The petition of right is said to owe its

[applicable when the crown is in possession of any hereditaments or chattels, and the petitioner suggests such a right as controverts the title of the crown, grounded on facts disclosed in the petition itself: and the petitioner must be careful to state truly the whole title of the crown, otherwise the petition shall abate (*g*). And then, upon this answer, "*soit droit fait al partie*"—*let right be done to the party*—being endorsed or underwritten by the crown (*h*), a commission issues to inquire into the truth of the suggestion (*i*); after the return to which, the attorney-general is at liberty to plead; and the merits shall be determined upon some issue of fact or of law, as in actions between subject and subject. Thus, if a disseisor of lands which are holden of the crown dies seised without any heir, whereby the crown is *primâ facie* entitled to the lands, and the possession is cast on it, either by inquest of office, or by act of law without any office found; now the disseisee shall, here, have remedy by petition of right,—suggesting the title of the crown, and his own superior right before the disseisin made (*k*).]

As to the effect of these proceedings, we may remark, that if the right be determined against the crown, the judgment used to be that of *ouster le main*, or *amoveas manus*, viz. "*quod manus domini regis amoveantur, et possessio restituatur petenti, salvo jure domini regis*" (*l*)—which last clause was always added to a judgment against the sovereign, to whom no laches is ever imputed; and whose right—till some modern statutes—was never defeated by any limitation or length of time (*m*); and by such judg-

origin to Edw. 1. (See Co. Entr. 402, 419; Bro. Ab. tit. Prerog. 2; Fitz. Ab. tit. Error, 8; Smith *v.* Upton, 6 Man. & G. 252; Baron de Bode's case, 8 Q. B. 208; Simpson *v.* Clayton, 4 Bing. N. C. 766.) See also Chitty's Treatise on the Prerogative of the Crown, where full information will be found as to a *monstrans de droit*.

(*g*) Finch, L. 255.

(*h*) St. Tr. vii. 134.

(*i*) Skin. 608; Rast. Ent. 461.

(*k*) Bro. Ab. tit. Petition, 20; 4 Rep. 58.

(*l*) 2 Inst. 695; Rast. Ent. 463.

(*m*) Finch, L. 460; 2 & 3 Edw. 6, c. 8, s. 14.

ment, the crown was instantly out of possession; so that there needed not the interposition of his own officers, as upon an ejectment, to transfer the seisin from the sovereign to the party aggrieved (*n*).

The proceedings upon a petition of right (which at one time were extremely tedious and expensive) have been made the subject of a modern statute (23 & 24 Vict. c. 34); under which, it is provided, that the petition shall be left with the secretary of state for the home department, for her Majesty's consideration; who, if she shall think fit, may grant her fiat that right be done—on which fiat no fee or reward is to be taken; and thereupon (the fiat having been served on the solicitor to the treasury) an answer, plea, or other defence is made on behalf of the crown; and the subsequent proceedings are assimilated, so far as practicable, to the course of an ordinary action (*o*). And in cases in which a judgment of *amoveas manus* would theretofore have been given on a petition of right, a judgment that the suppliant is entitled to the whole or some portion of the relief sought by his petition—or to such other relief, and on such terms and conditions, as the court may think right—is given instead,—which judgment has the same effect as a judgment of *amoveas manus* (*p*). Upon any petition of right under this Act, it is also provided, that *costs* shall be payable both to and by the crown, subject to the same rules, so far as practicable, as obtain in proceedings between subject and subject (*q*). Nothing in the

(*n*) Finch, L. 459.

(*o*) Thus the defence may be *double* (Tobin *v.* The Queen, 16 C. B., N. S. 310); on the other hand, the suppliant is not to be entitled to obtain discovery of documents or any other discovery. (Thomas *v.* The Queen, Law Rep., 10 Q. B. 44.) As to a petition of right under this statute, see also Kirk *v.* The Queen, ib. 14 Eq. Ca. 558; Windsor, &c. Rail. Co. *v.* The Queen, 11 App. Ca. 607. The proceedings in a petition of right will be found set forth in Tobin *v.* The Queen, supra.

(*p*) 23 & 24 Vict. c. 34, ss. 9, 10.

(*q*) Sect. 12. As to the *certificate* for costs against the crown, given (by the judge dealing with the petition) to the Commissioners of the Treasury, or (in matters affecting

Act prevents, however, any suppliant from proceeding as he might have done before it passed.

II. The method of redressing such injuries as the crown may receive from the subject, may be by such actions as are consistent with the royal prerogative and dignity; but more effectual remedies are usually obtained by such prerogative modes of process, as are peculiarly confined to the crown (*r*). [And among these prerogative methods, is that of *inquisition* (or *inquest*) *of office* (*s*),—which is an inquiry made by the sovereign's officer, his sheriff, coroner, or escheator, (either *virtute officii*, or by writ to them sent for that purpose,) or by commissioners specially appointed, concerning any matter that entitles the crown to the possession of lands or tenements, goods, or chattels; and this is done by a jury of no determinate number—being either twelve, or less, or more (*t*). As to inquire whether the crown's tenant for life died seised,—whereby the reversion accrues to the sovereign; whether A., who held immediately of the crown, died without heir,—in which case the land must belong to the sovereign by escheat; whether B. be an idiot *a nativitate*,—and therefore, together with his lands, appertains to the custody of the sovereign; and other questions of a like import, concerning both the circumstances of the tenant, and the value or identity of his lands. These inquests of office were more frequently in use, during the continuance of the military tenures

the crown in its private capacity) to the Treasurer of the Household, —see sects. 13, 14, et sched. No. 5.

(*r*) It is said in the books, that the sovereign cannot bring ejectment, because that action supposes the dispossession of the plaintiff, whereas (in contemplation of law and by reason of his legal ubiquity) the crown can never be dispossessed; but the crown may bring *quare impedit*, because that supposes the plaintiff to be seised or possessed of the advowson (Bro. Ab. tit. Prerog. 89, 130; F. N. B. 90; Y. B. 4 Hen. 4, pl. 4; Att.-Gen. *v.* Lord Churchill, 8 Mee. & W. 172).

(*s*) 12 & 13 Vict. c. 109, ss. 30 et seq.; Dean *v.* Reginam, 15 Mee. & W. 475.

(*t*) Finch, L. 323, 425.

[amongst us, than at present; for then, upon the death of any tenant of the crown, such an inquest was held, called an *inquisitio post mortem*,—to inquire of what lands such tenant died seised, who was his heir, and of what age,—in order to entitle the king to his marriage, wardship, relief, *primer seisin*, or other advantage as the circumstances of the case might turn out. And to superintend and regulate these inquiries, the Court of Wards and Liveries was instituted by the statute 32 Hen. VIII. c. 46; but (as we have seen) was abolished at the restoration of King Charles the second, together with the oppressive tenures upon which it was founded. With regard, however, to the other matters above referred to, inquests of office still remain in force, and are taken upon proper occasions,—being extended not only to lands, but also to goods and chattels personal,—as in the case of wreck, treasure trove, and the like.] But the most frequent occasion for them in modern times has been to ascertain forfeitures for offences—as whether B. was attainted for treason, or whether C., lying dead, had died feloniously by his own hands, and the like,—this latter occasion, however, no longer existing, since, by the Felony Act, 1870, no inquest of any treason, felony, or *felo de se*, now causes any forfeiture or escheat (*u*).

[These inquests of office were devised by law as an authentic means to give the sovereign his right by solemn matter of record; for it is a part of the liberties of England, and greatly for the safety of the subject, that the sovereign may not enter upon or seize any man's possessions, upon bare surmises, without the intervention of a jury (*x*); and, by the statute 18 Hen. VI. c. 6, it was enacted, that all grants of forfeited lands and tenements, before *office found* or returned into the Exchequer, should be void; and by the Bill of Rights at the Revolution, (1 W. & M. sess. 2, c. 2,) it was declared, that all grants

(*u*) 33 & 34 Vict. c. 23, s. 1.

(*x*) Sheffeild *v.* Ratcliffe, Hob. 347; Gilb. Hist. Ex. 132.

[and promises of fines and forfeitures of particular persons before *conviction*, (which is here the inquest of office,) were illegal and void,—which indeed was the law of the land in the reign of Edward the third (*y*).]

There are cases, however, in which the crown is entitled without office found,—the inquest (if held) being only for the better instruction of the officer before seizure, and to protect the subject from the adoption of hasty measures (*z*); and though the rule formerly was, that where a common person cannot have possession without entry, the sovereign cannot have it without an office, yet now it is otherwise (*a*); for, by 22 & 23 Vict. c. 21, s. 25, when any right of re-entry upon lands or other hereditaments shall have accrued to the crown, such right may be exercised or enforced without any inquisition taken or office found, and without any actual re-entry being made on the premises.

As to the effect of these inquests when taken, it may be laid down as generally true with regard to real property, that if an office be found for the sovereign, and the land be not held at the time by a stranger, the finding puts the crown into immediate possession, without the trouble of a formal entry; and the crown shall receive all the mesne or intermediate profits from the time that its title accrued (*b*). On the other hand, by the *Articuli super cartas*, if the king's escheator or sheriff seize lands into the king's hand, without cause, upon taking them out of the king's hand again, the party shall have the mesne profits restored to him (*c*).

In order to avoid the possession of the crown acquired by the finding of such office, the subject may either have his petition of right, or may traverse the inquisition (*d*),—according to the distinctions which we have already had

(*y*) 2 Inst. 48.

(*z*) Gilb. Exch. 109, 13, 4; 16 Vin. Ab. 79, Office, B.; 12 East, 102.

(*a*) Chit. Prerog. 249.

(*b*) 3 Bl. Com. 260; Finch, L. 325, 326.

(*c*) 28 Edw. 1, c. 19.

(*d*) In re Ann Parry, Ex parte Duke of Beaufort, Law Rep., 2 Eq. Ca. 95.

occasion to explain; and under the provisions of a modern statute (28 & 29 Vict. c. 104, s. 52), in case the subject thinks himself aggrieved by any description of boundary or other finding on the inquisition, he is entitled to file a statement of his objection thereto,—which objection shall thereupon be directed by the court to be inquired into by a fit person; when, if his return in writing differs in effect from the inquisition, the latter shall be deemed to be altered so as to conform with the return.

Again, upon all debts of record due to the crown, the sovereign has his peculiar remedy by writ of *extent* (*e*), under which both the lands and the goods of the debtor may be taken at once, in order to compel the payment of the debt (*f*). And this proceeding is called an *extent*, from the words of the writ,—which directs the sheriff to cause the lands, goods and chattels to be appraised at their full, or extended value (*extendi facias*), before they are delivered to satisfy the debt. A debt of record, as regards the crown, is subject in general to the same definition as in the case where the party to whom it is due is a subject; but there are several instances, besides, in which a debt is so ranked in favour of the crown, by way of exception from the general rule, and by force of its special prerogative. For, first, it having been provided, in the case of debts acknowledged on statute merchant or statute staple, that (upon forfeiture of these) execution might issue at once, both against lands and goods (*g*),—it was, by 33 Hen. VIII. c. 39, afterwards enacted, among other provisions, that *all* obligations made to the king should have the same force,—and of conse-

(*e*) In the earlier orders under the Judicature Acts, no allusion was made to an extent; and there is no specific allusion to it in any of the later orders and rules; and although, by Ord. lxviii. r. 2, the procedure on the revenue side of the Exchequer is now assimilated in numerous respects to the procedure in an ordinary action, the writ of extent is not expressly included therein.

(*f*) 3 Rep. 12 b; Gilb. Ex. 7; 2 Saund. by Wms. 70.

(*g*) 2 Saund. 69 b.

quence the same remedy to recover them,—as a statute staple (*h*). Moreover, by the 13 Eliz. c. 4, the lands of all such treasurers, and other officers as therein mentioned, are made liable to the crown, for debts due on their accounts, in the same manner as if on the day they first became officers or accountants, respectively, they had stood bound by writing obligatory having the effect of statute staple (*i*); and, by 43 Geo. III. c. 99, s. 41, and 5 & 6 Will. IV., c. 20, s. 13, duties detained in the hands of tax collectors may be recovered as a debt upon record to the crown, with all costs and charges (*k*).

A writ of extent, for recovery of the crown's debt, commissions the sheriff to take an inquisition (or inquest of office), on the oaths of lawful men, to ascertain the lands, goods, and debts of the defendant, and to seize the same into the hands of the sovereign. It has, however, in general, been held necessary, that the extent should be preceded by a *scire facias* (*l*),—in order to bring the defendant into court, and afford him an opportunity of showing that the extent ought not to issue (*m*); though, on the other hand, in cases where there is any danger of the debt being lost, an *immediate* extent has been directed to issue, (*i. e.*, an extent without either commission of inquest or *scire facias*,) upon affidavit of the circumstances (*n*). In ordinary cases, the writ having issued,—and the inquisition having been taken, and the seizure made under it by the sheriff, upon the same being returned into court,—the defendant, if he means to dispute the debt,—or any third person, who thinks proper to advance a claim to the property set forth in the inquisition,—must enter an appearance for that purpose; when he will be permitted to plead to the extent (*o*); and

(*h*) 3 Bl. Com. 420; R. *v.* Lamb, 3 Price, 649; 3 Rep. 12; Gilb. Ex. 7.

(*i*) R. *v.* Rawlings, 12 Price, 834; R. *v.* Fernandez, ib. 862.

(*k*) R. *v.* Wrangham, 1 Tyrw. 383.

(*l*) Chit. Prerog. 271; Crown Office Rules (1886), r. 127.

(*m*) Chit. Prerog. 271.

(*n*) Chit. Prerog. 277; 28 & 29 Vict. c. 104, s. 47.

(*o*) By 33 Hen. 8, c. 39, s. 55,

issue thereon having been joined either in law or in fact, the matter is decided according to the ordinary course of practice in actions between subject and subject.

With respect to the *effect* of an extent, the lands of a crown debtor are bound, in general, from the time when the debt becomes one of record (*p*),—which in the case of such bonds as are mentioned in 33 Hen. VIII. c. 39, s. 50, is from the time the bonds are executed; and although, by the common law, debts (not of record) due from public officers and accountants to the crown, bound the debtor's *lands*, only from the time they accrued due; yet, by the 13 Eliz. c. 4, arrears due from tellers, receivers, and such other officers as are in this behalf mentioned in that statute, are declared to bind the lands from the time when they entered into their offices (*q*). As for the *goods* of the debtor, they are bound from the *teste* (or date) of the extent (*r*),—a rule which seems to apply also to any debts owing to the debtor (*s*). It was also provided, by 33 Hen. VIII. c. 39, s. 74, that the crown's debt should, in suing out execution, be preferred to that of every other creditor who had not obtained judgment before the crown commenced its action (*t*); however, as regards crown debts, it has now been enacted, by 28 & 29 Vict. c. 104, s. 48, that no debt due to the crown, on any judgment, decree, order, recognizance, inquisition of debt, obligation, or specialty,—nor in respect of any acceptance of office under the crown,—shall affect any lands, as to *bonâ fide* purchasers or mortgagees (with or without notice), unless a writ of execution

the crown debtor may allege or show any good and sufficient "matter in law, reason, or good conscience," in bar or discharge of the debt.

(*p*) 2 Roll. Ab. 156, B. pl. 1.

(*q*) Wilde *v.* Forte, 4 Taunt. 334; Chit. Prerog. 294; 3 Bl. Com. 420; 1 & 2 Geo. 4, c. 121, s. 10.

(*r*) Chit. Prerog. 285; 1 Saund. by Wms. 219 g.

(*s*) 3 Bl. Com. 420. See Chit. Prerog. 304; R. *v.* Lambton, 5 Price, 428; Shears *v.* Lord Advocate, 6 Clark & Fin. 180.

(*t*) Edwards *v.* Reginam, 9 Exch. 628; Re Oriental Bank, 28 Ch. Div. 643; In re West London Commercial Bank, 38 Ch. Div. 364.

has been issued and *registered* before the execution of the conveyance or mortgage and payment of the money. And with regard to the *exoneration* of lands from crown debts, it has been provided, that whenever a *quietus* shall be obtained by a debtor or accountant to the crown—and an office copy thereof has been left at the proper office, together with a certificate signed by the paymaster-general, that the same may be registered,—the Master shall forthwith enter the same in the proper book accordingly (*u*). For which purpose, the lords of the Treasury, (or any three of them,) may, by writing under their hands,—upon payment of such sums as they shall think fit into the receipt of her Majesty's exchequer, to be applied in liquidation of the debt or liability of any debtor or accountant to the crown, or upon such other terms as they may think proper,—certify, that any lands, tenements, or hereditaments of any such debtor or accountant shall be held by the purchaser or mortgagee, or intended purchaser or mortgagee thereof, wholly exonerated from all further claim of the crown; or, in the case of leases obtained on payment of fines, may certify, that the lessee shall hold the premises exonerated in like manner, without prejudice to the right of the crown to the reversion upon such lease, and the rents and covenants incident to such reversion,—and thereupon the same lands, tenements, and hereditaments shall respectively be held exonerated as aforesaid.

Such is, in general, the state of the law relating to the principal kind of extent, called an extent *in chief;* and a sub-variety of it, called an extent *in chief in the second degree*, may be here noticed,—this latter being a proceeding by the crown *proprio motu* against the debtor of him against whom an extent in chief has issued; and the statute 57 Geo. III. c. 117, presently to be mentioned, does not apply thereto (*x*);

(*u*) 2 & 3 Vict. c. 11; 18 & 19 Vict. c. 15; 22 & 23 Vict. c. 35, s. 22; 23 & 24 Vict. c. 115.

(*x*) R. *v.* Shackle, 11 Price, 772; Reg. *v.* Adams, 2 Exch. 299.

which therefore is regulated, *mutatis mutandis*, like the extent in chief itself.

Besides the extent in chief, whether of the first or second degree, there is also an extent *in aid;* which issues, not at the suit of the crown, like an extent in chief, but at the suit or instance of the crown debtor against a person indebted to the crown debtor himself (*y*); and this practice of issuing extents in aid, was at one time carried to so great a length, (particularly by issuing them for larger sums than were in fact due to the crown from the prosecutor), as to enable crown debtors, in almost every case, to convert to their own benefit a species of execution properly belonging to the crown,—thereby obtaining an undue preference as regards other creditors; but the resort to extents in aid was subjected, by 57 Geo. III. c. 117, to restraints which tended to the rectification of this abuse (*z*).

There is also a special writ of extent, which is applicable in the event of the death of a crown debtor; and which is called a *diem clausit extremum*, because it recites the death of the party (*a*). By this writ (which issues on an affidavit of the debt and death), the sheriff is commanded to take and seize the chattels, debts, and land of the debtor who has so died, into the hands of the crown (*b*).

[When the crown hath unadvisedly granted anything by letters patent which ought not to be granted; or where the grantee hath done some act that amounts to a forfeiture of the grant,—the remedy to repeal the patent used to be by writ of *scire facias* (*c*); which writ might be brought either on the part of the crown, in order to resume

(*y*) R. *v.* Gibbs, 7 Price, 633; R. *v.* Tarleton, 9 Price, 647; R. *v.* Kynaston, 11 Price, 598.

(*z*) No fiat for an extent in aid is issued, without an affidavit that there will otherwise be danger of the debt being lost to the crown.

(*a*) Ex parte Hippesley, 2 Price, 379; R. *v.* Hodge, 12 Price, 537; R. *v.* Hassell, M'Clel. 105; R. *v.* Lord Crewe, 5 Dowl. 158.

(*b*) 28 & 29 Vict. c. 104, s. 47.

(*c*) 3 Lev. 220; 4 Inst. 88.

[the thing granted: or, if the grant was injurious to a subject, the crown was bound, of right, to permit him (upon his petition) to use the royal name for repealing the patent, in a *scire facias* (*d*). And so also, if, upon office untruly found for the crown, the land was granted over to another,—he who was aggrieved thereby, and traversed the office itself, was entitled, before issue joined, to a *scire facias* against the grantee, in order to avoid the grant (*e*) ;] and for this latter purpose, the remedy by *scire facias* is still available ; as also for the repeal of letters patent generally ; but in the case of letters patent, where they have been granted for inventions, a petition for their repeal is now the proper remedy of the subject (*f*).

An *information* on behalf of the crown, exhibited by the attorney-general, is also a method of proceeding, for obtaining satisfaction in respect of an injury to any of the possessions of the crown (*g*) ; and it is instituted, to redress a *civil* injury by which the property of the crown is affected, thus differing from an information filed in the Queen's Bench Division of the High Court of Justice,—of which we shall treat in the next Book—which latter is to punish some heinous misdemeanor in the defendant immediately affecting the sovereign, and not such as can be properly left to a prosecution by way of indictment (*h*). [The most usual informations, of the description now under review, are those of intrusion (*i*), and of debt (*k*) : the information of *intrusion* being for any trespass committed on the lands of the crown (*l*),—as by entering

(*d*) R. *v.* Butler, 2 Ventr. 344.

(*e*) Bro. Ab. tit. Scire Facias, 69, 185.

(*f*) 46 & 47 Vict. c. 57, s. 26 ; In re Avery's Patent, 36 Ch. Div. 307.

(*g*) Yelverton's case, Moor, 375 ; Att.-Gen. *v.* Edmunds, Law Rep., 6 Eq. Ca. 381.

(*h*) Vide post, vol. IV. bk. VI. chap. XIV.

(*i*) 4 Rep. 58 a ; Attorney-General *v.* Parsons, 2 M. & W. 23 ; Attorney-General *v.* Hill, ib. 160.

(*k*) Attorney-General *v.* Sewell, 4 Mee. & W. 77.

(*l*) Nannge *v.* Rowland ap Ellis, Cro. Jac. 212 ; Lord Vaux's case, 1 Leon. 49 ; Attorney-General *v.* Lord Churchill, 8 Mee. & W. 171 ; Attorney-General *v.* Hallett, 1 Exch. 211.

[thereon without title, holding over after a lease is determined, taking the profits, cutting down timber, and the like; and the information of *debt* being for moneys due to the crown upon the breach of a penal statute (*m*). This information is also commonly used to recover forfeitures occasioned by transgressions of those laws which are enacted for the establishment and support of the revenue, —penalties inflicted by the laws which regard matters of police and public convenience being usually left to be enforced by common informers, in *qui tam* actions; but after the attorney-general has informed upon a breach of the penal law, no other information can be received (*n*).

There is also an information *in rem*, when any goods are supposed to become the property of the crown, and no man appears to claim them or to dispute the crown's title:—as, antiently, in the case of treasure-trove, wrecks, waifs, and estrays, seized by the crown's officer for its use. Upon such seizure an information may be filed in the Exchequer, and now in the Queen's Bench Division, and thereupon a proclamation is made for the owner (if any) to come in and claim the effects; and at the same time a commission of *appraisement* issues, to value the goods in the officer's hands: after the return of which, and a second proclamation had, if no claimant appear, the goods are supposed derelict, and are condemned to the use of the crown (*o*). And when, in later times, forfeitures of the goods themselves, as well as personal penalties on the parties, were inflicted by Act of Parliament for transgressions against the laws of the customs and excise,—there was the same process, in order to secure such forfeited goods to the public use, though the offender himself should escape the reach of justice.]

Finally, we may remark, that by 18 & 19 Vict. c. 90, ss. 1, 2, the subject of costs in all legal proceedings, by or

(*m*) See 41 Geo. 3, c. 90, as to enforcing, in Ireland, payment of crown debts recovered in England, and *vice versâ*.

(*n*) Hard. 201.

(*o*) Gilb. Hist. Exch. c. 13.

on behalf of the crown in matters relating to the *public revenue*, was placed upon the same footing as the subject of costs in actions between subject and subject (*p*),—though, by the general rule of law, as it stands independently of this statute, the crown neither pays nor receives costs (*q*); and by a modern statute, commonly called "The Crown Suits Act, 1865," the proceedings in the Exchequer, by way of information, and in other matters relating to the revenue, were simplified and assimilated, in many respects, to the procedure in an action (*r*); and they have been further simplified by the Order of 1883, relative to this procedure (*s*), and by the Crown Office Rules, 1886 (*t*).

[We have now gone through the whole circle of civil injuries, and the mode of redress which the laws of England have provided for each. In which the student cannot but have observed, that the main difficulty which attends their discussion, arises from their great variety: which is apt, on our first acquaintance with them, to breed confusion of ideas, and a kind of distraction to the memory,—a difficulty not a little increased by the very immethodical arrangement in which they are delivered to us by our antient writers, and the numerous terms of art in which the language of our ancestors has obscured them. For terms of art there will unavoidably be in all sciences,—the easy conception and thorough comprehension of which must depend upon frequent and familiar use; and the

(*p*) By 25 & 26 Vict. c. 14, the provisions of this statute were extended to the *Isle of Man*.

(*q*) See 24 Hen. 8, c. 8; 3 Bl. Com. 400; 25 Geo. 3, c. 35; Attorney-General *v.* Shillibeer, 4 Exch. 606; The Queen *v.* Beadle, 7 Ell. & Bl. 492.

(*r*) 28 & 29 Vict. c. 104. See also 18 & 19 Vict. c. 90; and 22 & 23 Vict. c. 21.

(*s*) Ord. lxviii. r. 2.

(*t*) See Mellor's Crown Practice.

[more subdivided any branch of science is, the more must these terms be used, to express the nature of these several sub-divisions, and to mark out with sufficient precision the ideas they are meant to convey. But this difficulty, however great it may appear at first view, will shrink to nothing upon a nearer and more frequent approach; and indeed, it is rather advantageous than of disservice, by imprinting on the mind a clear and distinct notion of the several remedies. And such as it is, the difficulty arises principally from the excellence of our English laws; which apply their redress exactly to the circumstances of the injury, and do not furnish one and the same proceeding for different wrongs which are impossible to be brought within one and the same description; whereby every man knows what satisfaction he is entitled to expect from the courts of justice; and as little as possible is left in the breast of the judges, whom the law appoints to administer, and not to prescribe, the remedy.]

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